DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 11-1425
Title: Missouri, Petitioner
v.
Tyler G. McNeely
Docketed: May 25, 2012
Lower Ct: Supreme Court of Missouri
Case Nos.: (SC 91850)
Decision Date: January 17, 2012
Rehearing Denied: March 6, 2012

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
May 22 2012	Petition for a writ of certiorari filed. (Response due June 25, 2012)
Jun 8 2012	Order extending time to file response to petition to and including July 25, 2012.
Jul 25 2012	Brief of respondent Tyler G. McNeely in opposition filed.
Aug 8 2012	DISTRIBUTED for Conference of September 24, 2012.
Aug 14 2012	Reply of petitioner Missouri filed. (Distributed)
Sep 25 2012	Petition GRANTED.
Oct 31 2012	SET FOR ARGUMENT ON Wednesday, January 9, 2013
Nov 5 2012	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent.
Nov 9 2012	Joint appendix filed. (Statement of costs received)
Nov 9 2012	Brief of petitioner Missouri filed.
Nov 13 2012	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Nov 16 2012	CIRCULATED.
Nov 16 2012	Brief amicus curiae of Mothers Against Drunk Driving filed. (Distributed)
Nov 16 2012	Brief amici curiae of National District Attorneys Association, et al. filed. (Distributed)
Nov 16 2012	Brief amici curiae of Delaware, et al. filed. (Distributed)
Nov 16 2012	Brief amicus curiae of the United States filed. (Distributed)
Dec 10 2012	Brief of respondent Tyler G. McNeely filed. (Distributed)
Dec 10 2012	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Dec 14 2012	Brief amicus curiae of Rutherford Institute filed. (Distributed)
Dec 17 2012	Brief amici curiae of Law Professors filed. (Distributed)
Dec 17 2012	Brief amici curiae of National College for DUI Defense, et al. filed. (Distributed)

Dec 20 2012	Record received from The Supreme Court State of Missouri. (1 Box)
Jan 2 2013	Reply of petitioner Missouri filed. (Distributed)
Jan 4 2013	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Jan 9 2013	Argued. For petitioner: John N. Koester, Jr., Assistant Prosecuting Attorney, Jackson, Mo.; and Nicole A. Saharsky, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondent: Steven R. Shapiro, New York, N. Y.

PETITION FOR WRIT OF CERTIORARI

No. 11-1425

In The
Supreme Court of the United States

STATE OF MISSOURI,

Petitioner,

v.

TYLER G. McNEELY,

Respondent.

On Petition For A Writ Of Certiorari To The Missouri Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a law enforcement officer may obtain a nonconsensual and warrantless blood sample from a drunk driver under the exigent circumstances exception to the Fourth Amendment warrant requirement based upon the natural dissipation of alcohol in the bloodstream.

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PETITION FOR A WRIT OF CERTIORARI

The State of Missouri respectfully petitions for a writ of certiorari to review the judgment of the Missouri Supreme Court in this case.

OPINIONS BELOW

The opinion of the Missouri Supreme Court is reported as *State v. McNeely*, 358 S.W.3d 65 (Mo.banc 2012), and can be found in the Appendix (hereinafter "App."), *infra*, 1a-22a. The order of the Missouri Supreme Court denying rehearing is not reported. App., *infra*, 47a-48a. The opinion of the Missouri Court of Appeals is not reported, but can be found at 2011 WL 2455571 (Mo.App. E.D.). App., *infra*, 23a-38a. The judgment of the trial court granting Respondent's motion to suppress evidence can be found in the Appendix. App., *infra*, 39a-46a.

JURISDICTION

The Missouri Supreme Court entered its judgment on January 17, 2012. The Court denied petitioner's motion for rehearing on March 6, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Respondent filed a pretrial motion to suppress evidence, seeking to exclude the results of a blood sample taken after his arrest for driving while intoxicated. The trial court granted the motion to suppress, holding that the blood sample was obtained in violation of Respondent's Fourth Amendment rights. App., *infra*, 39a-46a. Petitioner filed an interlocutory appeal. The Missouri Court of Appeals, Eastern District, reversed the ruling of the trial court. App., *infra*, 23a-38a. The Court of Appeals subsequently transferred the case to the Missouri Supreme Court, citing the general importance of the issue. *Id.* The Missouri Supreme Court affirmed the ruling of the trial court, holding that Respondent's Fourth Amendment rights were violated. App., *infra*, 1a-22a. Petitioner filed a motion for rehearing, which was denied. App., *infra*, 47a-48a.

A. Facts

On October 3, 2010, at approximately 2:08 A.M., Respondent was pulled over by a Missouri state highway patrolman for exceeding the speed limit. App., *infra*, 4a, 24a, 39a-40a. The patrolman noticed that Respondent displayed signs of intoxication, including bloodshot eyes, slurred speech, and the odor of alcohol on his breath. *Id.* These observations changed the nature of the patrolman's investigation from a routine traffic stop to a drunk-driving investigation. *Id.* When the patrolman asked Respondent to step out of his truck, he observed that Respondent was unsteady on his feet. The patrolman then administered a series of standard field-sobriety tests. After performing poorly on all of the tests, Respondent was placed under arrest for driving while intoxicated. *Id.*

The patrolman secured Respondent in his patrol car and began to transport him to the county jail. While in the patrol car the patrolman asked Respondent if he would agree to voluntarily provide a breath sample when they arrived at the jail. Respondent told the patrolman that he would refuse to provide a breath sample. App., *infra*, 4a-5a, 24a-25a, 39a-40a. The patrolman then decided to drive directly to a nearby hospital in order to obtain a blood sample to secure evidence of intoxication. *Id.* At the hospital the patrolman read an implied consent form to Respondent and requested a blood sample. Respondent refused to voluntarily consent to the blood test. *Id.* The patrolman then directed a hospital lab technician to draw a blood sample, which was collected as

evidence at 2:33 A.M. *Id.* Chemical analysis of the blood sample later revealed that Respondent's blood-alcohol content was 0.154 percent, well above the legal limit of .08 percent. *Id.*

The patrolman did not attempt to obtain a search warrant before directing the hospital lab technician to draw the sample of Respondent's blood.[1] App., *infra*, 4a-5a, 40a. Obtaining a search warrant in the middle of the night in Cape Girardeau County involves a delay, on average, of approximately two hours. (Record on Appeal: Tr. 26-27.) The generally accepted rate of elimination of alcohol in the bloodstream is between .015 and .020 percent per hour. (Record on Appeal: Tr. 20-21.)

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[1] Although the patrolman had obtained search warrants in driving while intoxicated cases in the past, he did not attempt to obtain one in this case because he had read an article during a training session that stated a search warrant was no longer necessary due to a recent statutory amendment to the "refusal" provision of the Missouri implied consent law. App., *infra*, 4a-5a n.2. Prior to the amendment, the statute provided that if a person refused a chemical test, then "none shall be given." Mo. Rev. Stat. § 577.041.1 (Cum.Supp.2009). Effective on August 28, 2010, the phrase "none shall be given" was deleted from the statute. § 577.041.1 (Cum.Supp.2010). App., *infra*, 34a-38a, 43a-45a. Nonetheless, the Missouri Supreme Court found it unnecessary to address the issue of the statutory amendment because it held the Fourth Amendment was violated. App., *infra*, 21a n.9.

B. Procedural History

1. Cape Girardeau County Circuit Court

Respondent was charged by Information with driving while intoxicated in the Circuit Court of Cape Girardeau County, Missouri, in violation of Mo. Rev. Stat. § 577.010 (2000).[2] (Record on Appeal: Legal File 8-9.) Respondent filed a pretrial motion to suppress evidence, seeking to exclude the results of the blood sample taken after his arrest. Respondent claimed that the nonconsensual and warrantless blood sample was obtained in violation of his Constitutional right to be free from unreasonable searches and seizures under the Fourth Amendment to the United States Constitution.[3] (Record on Appeal: Legal File p. 12.)

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[2] Because Respondent had two prior convictions for driving while intoxicated, he was charged with a class D felony under Missouri law, which carries a maximum term of imprisonment of four years. A first time offense for driving while intoxicated is a class B misdemeanor, carrying a maximum punishment of six months in jail. Mo. Rev. Stat. §§ 558.011, 577.023 (Cum.Supp.2010).

[3] Respondent also alleged his right to be free from unreasonable searches and seizures under the Missouri Constitution was violated. (V.A.M.S. Const. Art. I, § 15.) Although the courts below did not mention the Missouri constitutional provision, it should be noted that the Missouri Supreme Court has held that Article I, Section 15, provides the exact same guarantees against unreasonable searches and seizures as under the Fourth Amendment, and thus, the same analysis applies to cases under the Missouri Constitution as under the United

(Continued on following page)

The trial court granted Respondent's motion to suppress evidence, holding that the warrantless blood draw violated the Fourth Amendment. App., *infra*, 39a-46a. Basing the ruling on its interpretation of this Court's decision in *Schmerber v. California*, 385 U.S. 757 (1966), the trial court held that the natural dissipation of alcohol in the bloodstream does not constitute a sufficient exigency to justify a warrantless blood draw in a routine driving while intoxicated case. App., *infra*, 42a-43a. While acknowledging that *Schmerber* upheld a nonconsensual and warrantless blood draw in a drunk driving case against a Fourth Amendment challenge, the trial court found that *Schmerber* was limited to the "special facts" of that case. *Id.*

The trial court maintained that *Schmerber* requires the existence of additional "special facts," other than the dissipation of alcohol in the bloodstream, before a warrantless blood draw may be justified. These "special facts" were identified by the trial court as a motor vehicle accident resulting in physical injuries requiring emergency medical treatment. Because Respondent was not involved in an accident, and because Respondent did not suffer physical injuries requiring emergency medical treatment, the trial court concluded that *Schmerber* did not apply. The trial court stated:

States Constitution. See *State v. Oliver*, 293 S.W.3d 437, 442 (Mo.banc 2009).

> The facts before this court are substantially different than the facts of *Schmerber*. There was no accident. There was no investigation at the scene of the stop other than the field sobriety tests, which took less than ten minutes. The defendant was not injured and did not require emergency medical treatment. This was not an emergency, it was a run of the mill driving while intoxicated case. As in all cases involving intoxication, the Defendant's blood alcohol was being metabolized by his liver. However, a prosecutor was readily available to apply for a search warrant and a judge was readily available to issue a warrant. *Schmerber* is not applicable because the "special facts" of that case, the facts which established exigent circumstances, did not exist in this case to justify the warrantless search.

App., *infra*, 43a.

2. Missouri Court of Appeals, Eastern District

Petitioner filed an interlocutory appeal to the Missouri Court of Appeals, Eastern District. The Court of Appeals, in a unanimous 3-0 decision, issued a written opinion reversing the ruling of the trial court. App., *infra*, 23a-38a.

The Missouri Court of Appeals held that, in applying the exigent circumstances exception to the warrant requirement, "special facts" are not required to justify a warrantless blood draw. Instead, the

evanescent nature of blood alcohol evidence creates exigent circumstances such that no warrant is needed to conduct the search. App., *infra*, 33a. In its analysis, the Court of Appeals found the interpretation of *Schmerber* from other jurisdictions to be persuasive, including the Wisconsin Supreme Court in *State v. Faust*, 682 N.W.2d 371 (Wis. 2004), and the Sixth Circuit in *United States v. Berry*, 866 F.2d 887 (6th Cir. 1989). App., *infra*, 29a-31a. The Missouri Court of Appeals concluded:

> We have no reason to require 'special facts' in addition to the facts that the officer had ample cause to reasonably believe Defendant was under the influence of alcohol and that Defendant's blood alcohol concentration would continue to decrease, thus destroying evidence, the longer the police waited to conduct a blood test.

App., *infra*, 33a.

Citing the general interest and importance of the issue, however, the Missouri Court of Appeals transferred the case to the Missouri Supreme Court. App., *infra*, 24a, 38a.

3. Missouri Supreme Court

The Missouri Supreme Court disagreed with the Court of Appeals and affirmed the ruling of the trial court in a *per curiam* opinion, holding that the nonconsensual and warrantless blood draw was a violation

of Respondent's Fourth Amendment rights. App., *infra*, 1a-22a.

The Missouri Supreme Court held that *Schmerber* was expressly limited to its facts, and, noting that the patrolman was not confronted with these same "special facts," concluded that exigent circumstances did not exist. App., *infra*, 2a-3a, 8a-10a, 19a-21a. Explaining its rationale, the Court stated:

> The patrolman here, however, was not faced with the 'special facts' of *Schmerber*. Because there was no accident to investigate and there was no need to arrange for the medical treatment of any occupants, there was no delay that would threaten the destruction of evidence before a warrant could be obtained. Additionally, there was no evidence here that the patrolman would have been unable to obtain a warrant had he attempted to do so. The sole special fact present in this case, that blood-alcohol levels dissipate after drinking ceases, is not a *per se* exigency pursuant to *Schmerber* justifying an officer to order a blood test without obtaining a warrant from a neutral judge.

App., *infra*, 3a.

To support its view that *Schmerber* was limited to its facts, the Missouri Supreme Court asserted that *Schmerber* explicitly warned against expansive interpretations. App., *infra*, 18a. The Court relied on the following language in *Schmerber*:

> It bears repeating, however, that we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.

Schmerber, 384 U.S. at 772. The Missouri Supreme Court concluded that to allow a warrantless blood draw in the absence of "special facts" would be to ignore this Court's cautious limitation on the holding in *Schmerber*. App., *infra*, 19a.

In its analysis, the Missouri Supreme Court acknowledged that a clear and increasing split of authority has recently developed among other state courts of last resort in their respective interpretations of this Court's decision in *Schmerber*. The Missouri Supreme Court expressly disavowed the reasoning of other jurisdictions previously holding that the rapid dissipation of alcohol in the bloodstream constitutes a sufficient exigency to draw blood without a warrant, including the Wisconsin Supreme Court,[4] the Minnesota Supreme Court,[5] and the Oregon Supreme

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[4] *State v. Bohling*, 494 N.W.2d 399 (Wis. 1993); *State v. Faust*, 682 N.W.2d 371 (Wis. 2004).

[5] *State v. Shriner*, 751 N.W.2d 538 (Minn. 2008); *State v. Netland*, 762 N.W.2d 202 (Minn. 2009).

Court.[6] App., *infra*, 16a-19a. Ultimately, the Missouri Supreme Court adopted the rationale of the Utah Supreme Court in *State v. Rodriguez*, 156 P.3d 771 (Utah 2007), and the Iowa Supreme Court in *State v. Johnson*, 744 N.W.2d 340 (Iowa 2008), where the courts held that *Schmerber* requires "special facts" beyond the natural dissipation of alcohol in the bloodstream in order to justify a warrantless search. App., *infra*, 10a-13a.

Petitioner filed a motion for rehearing, which was overruled by the Missouri Supreme Court on March 6, 2012. App., *infra*, 47a-48a.

REASONS FOR GRANTING THE PETITION

I. The Decision Of The Missouri Supreme Court Creates A Further Division Among State Courts Of Last Resort And Conflicts With The Federal Circuits

The ruling of the Missouri Supreme Court has further deepened the division among state courts of last resort on a fundamental Fourth Amendment issue. The ruling also conflicts with decisions of the Federal Circuits. The Missouri Supreme Court acknowledged that a clear and increasing split of authority has recently developed among state courts

[6] *State v. Milligan*, 748 P.2d 130 (Or. 1988); *State v. Machuca*, 227 P.3d 729 (Or. 2010).

of last resort in their respective interpretations of this Court's decision in *Schmerber*. Some courts have interpreted *Schmerber* broadly, holding that the natural dissipation of alcohol in the bloodstream is sufficient to create exigent circumstances justifying a warrantless blood draw in drunk-driving related crimes. Other courts have taken a narrow, more restrictive view, essentially holding that *Schmerber* is limited to its "special facts." This emerging conflict on a fundamental Fourth Amendment issue will likely continue to divide courts throughout the United States until this Court takes action to clarify the holding in *Schmerber*.

***Schmerber v. California*, 384 U.S. 757 (1966)**

In *Schmerber,* this Court considered whether a nonconsensual and warrantless blood test taken from a defendant suspected of driving while under the influence of intoxicating liquor violated the Fourth Amendment. There, defendant had been arrested at a hospital while receiving treatment for injuries suffered in an accident after his automobile skidded off the road and struck a tree. *Id.*, at 758, 759 n.2. At the direction of a police officer, a warrantless blood sample was withdrawn by a physician despite the fact that defendant refused to consent to the test. *Id.*, at 758-759. Chemical analysis of the blood sample revealed defendant was intoxicated. *Id.* A report of the analysis was admitted at trial over defendant's objection, resulting in a conviction for a misdemeanor

offense of driving under the influence of intoxicating liquor. *Id.*, at 759 n.1.

On appeal, defendant claimed that the nonconsensual and warrantless blood withdrawal violated his right to be free from unreasonable searches and seizures under the Fourth Amendment. This Court disagreed. Holding the warrantless blood test was a reasonable search and seizure under the Fourth Amendment, this Court first concluded that probable cause existed to arrest the defendant for driving under the influence of alcohol. *Id.*, at 768-769. Next, this Court turned its attention to whether a search warrant was required before taking the blood sample. Concluding the warrantless search was reasonable, this Court stated:

> The officer in the present case, however, might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.' We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where time had to be taken to bring the accused to the hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these special facts, we conclude that

> the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner's arrest.[7]

Id., at 770-771 [citation omitted]. This Court further concluded that the test itself was reasonable, noting that blood tests are a "highly effective means of determining the degree to which a person is under the influence of alcohol" and that such tests are commonplace and routine, involving "virtually no risk, trauma, or pain." *Id.* Finally, this Court found the test was performed in a reasonable manner in that the blood was taken by a physician in a hospital environment according to accepted medical practices. *Id.* The defendant's right under the Fourth Amendment to be free of unreasonable searches and seizures, therefore, was not violated. *Id.*, at 772.

Recently, a deep split has emerged among various courts applying conflicting interpretations of *Schmerber*.

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[7] Although the decision was cast in terms of the "search incident to arrest" exception to the warrant requirement, subsequent decisions of this Court have recognized *Schmerber* as falling under the exigent circumstances exception. See *United States v. Dionisio*, 410 U.S. 1, 8 (1973); *Winston v. Lee*, 470 U.S. 753, 759 (1985); *Kentucky v. King*, 131 S.Ct. 1849, 1857 n.3 (2011).

A. Courts holding that the natural dissipation of alcohol in the bloodstream is sufficient to create exigent circumstances justifying a warrantless blood draw under *Schmerber*

Wisconsin Supreme Court

In *State v. Bohling*, 494 N.W.2d 399 (Wis. 1993) the Wisconsin Supreme Court held that the dissipation of alcohol from a person's bloodstream constitutes a sufficient exigency to justify a warrantless blood draw as long as the blood draw is taken at the direction of a law enforcement officer from a person lawfully arrested for a drunk-driving related crime, and there is a clear indication that the blood draw will produce evidence of intoxication. *Id.*, at 406. In reaching this conclusion, the Court noted that a "well-recognized exigent circumstance is the threat that evidence will be lost or destroyed if time is taken to obtain a warrant." *Id.*, at 401. Analyzing this Court's decision in *Schmerber*, the Court stated:

> *Schmerber* can be read in either of two ways: (a) that the rapid dissipation of alcohol in the bloodstream alone constitutes a sufficient exigency for a warrantless blood draw to obtain evidence of intoxication following a lawful arrest for a drunk driving related violation or crime – as opposed to taking a blood sample for other reasons, such as to determine blood type; or (b) that the rapid dissipation of alcohol in the bloodstream, coupled with an accident, hospitalization, and the lapse of

> two hours until arrest, constitute exigent circumstances for such a blood draw.

Bohling, at 402. The Court concluded that the most reasonable and logical interpretation of *Schmerber* was the first one set forth:

> A logical analysis of the *Schmerber* decision indicates that the exigency of the situation presented was caused solely by the fact that the amount of alcohol in a person's bloodstream diminishes over time. The fact that an accident occurred and that the defendant was taken to the hospital did not increase the risk that evidence of intoxication would be lost. A hospital trip to another location at which a medically qualified person is present is standard procedure for taking a blood sample in a drunk driving case, regardless of whether an accident occurred.

Bohling, at 402-403.

In *State v. Faust*, 682 N.W.2d 371, 378 (Wis. 2004), the Wisconsin Supreme Court reaffirmed that the exigency justifying a warrantless blood draw is the rapid metabolization and dissipation of alcohol in the bloodstream. There, the defendant was pulled over in a routine traffic stop, exhibited signs of intoxication, and was arrested for driving while intoxicated. *Id.*, at 374. The defendant consented to provide a sample of his breath for chemical analysis, which revealed his blood alcohol content was slightly above the legal limit. *Id.* Believing that he needed to secure additional evidence of intoxication, the arresting

officer requested the defendant to voluntarily provide a blood sample, which he refused. *Id.* Without attempting to obtain a search warrant, the officer then transported the defendant to a local hospital where a medical technician administered a blood test. *Id.*

The Wisconsin Supreme Court upheld the warrantless and nonconsensual blood test. The Court reiterated that "*Schmerber* stands for the proposition that the fact that alcohol rapidly dissipates in the bloodstream justifies an officer's belief that he is faced with 'an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatens the destruction of evidence.'" *Faust*, at 377 (quoting *Schmerber*, 385 U.S. at 770). The Court stated:

> The fact that the police have obtained a presumably valid chemical sample of the defendant's breath indicating the defendant's level of intoxication does not change the fact that that the alcohol continues to dissipate from the defendant's bloodstream. The evidence sought 'remains on a course to be destroyed.'

Faust, at 378 [Citation omitted]. The Court concluded that the presence of one presumptively valid chemical sample of the defendant's breath does not extinguish the exigent circumstances justifying a warrantless blood draw. *Id.*, at 379. Thus, "[t]he nature of the evidence sought, not the existence of other evidence, determines the exigency." *Id.*

Oregon Supreme Court

The Oregon Supreme Court likewise held that it is the evanescent nature of the evidence sought that constitutionally justifies the taking of a blood sample without a search warrant. *State v. Milligan*, 748 P.2d 130, 136 (Or. 1988). In so holding, the Court first determined that the police officer did, in fact, have probable cause to believe that an analysis of the defendant's blood would yield evidence that he had committed an alcohol-related crime. *Id.*, at 134. The Court then turned its attention to whether the police were required to obtain a search warrant before ordering the blood draw, and ultimately concluded that the warrantless blood draw was justified under the exigent circumstances exception to the warrant requirement. *Id.* The Court stated, "[w]hen he was seized, the officers had probable cause to believe that defendant was a vessel containing evidence of a crime he had committed – evidence that was dissipating with every breath he took." *Id.* The Court noted that in order to accurately determine the level of alcohol in the suspect's blood at the time of the alleged crime, the police must obtain an initial sample of the suspect's blood with as little delay as possible. *Id.*

In reaching this conclusion, the Oregon Supreme Court analyzed this Court's decision in *Schmerber*. The Oregon Supreme Court interpreted the "special facts" existent in *Schmerber* to be the evanescent nature of alcohol in the blood, and the fact that the blood test was reasonable in that it was performed by a physician in a hospital environment according to

accepted medical practices. *Milligan*, at 135. The Oregon Supreme Court did not find that an accident resulting in physical injuries requiring emergency medical attention were "special facts" necessary to justify a warrantless blood draw. Instead, the Court found that *Schmerber* "relied on the exigency created by the evanescent nature of blood alcohol and the danger that important evidence would disappear without an immediate search." *Milligan*, at 135.

Recently, in *State v. Machuca*, 227 P.3d 729 (Or. 2010), the Oregon Supreme Court reiterated that the evanescent nature of a suspect's blood alcohol content is an exigent circumstance that will ordinarily permit a warrantless blood draw. *Id.*, at 736. There, the Court rejected an approach that would have required the State to prove that it could not have obtained a search warrant without sacrificing the evidence. *Id.* The Court concluded that the focus should be on the exigency created by blood alcohol dissipation, not on the speed with which a warrant could presumably be obtained. *Id.* The Court acknowledged that, from time to time, there may be rare instances where a search warrant could be both obtained and executed in a timely fashion. *Id.* "The mere possibility, however, that such situations may occur from time to time does not justify ignoring the inescapable fact that, in every such case, evidence is disappearing and minutes count." *Id.* The Court reaffirmed the holding in *Milligan*, concluding that "when probable cause to arrest for a crime involving the blood alcohol content of the suspect is combined with the undisputed evanescent

nature of alcohol in the blood, those facts are a sufficient basis to conclude that a warrant could not have been obtained without sacrificing the evidence." *Machuca*, at 736.

Minnesota Supreme Court

The Minnesota Supreme Court held that the dissipation of alcohol in a defendant's blood creates a "single-factor exigent circumstance" that will justify a warrantless and nonconsensual blood draw. *State v. Shriner*, 751 N.W.2d 538 (Minn. 2008). The Court based its holding on the imminent destruction of evidence, noting that with every passing minute, the most probative evidence is subjected to destruction by the body's natural processes. *Id.*, at 545. The Court stated, "[i]t is undisputed that as a result of the body's physiological processes, the blood-alcohol content in a defendant's blood dissipates with the passage of every minute." *Id.*, at 546. The Court rejected a "totality of the circumstances" approach that would require law enforcement officers to consider the length of delay in obtaining a search warrant in determining whether exigent circumstances exist. *Id.* The Court found that requiring an officer in the field to speculate on a range of other factors outside of the officer's control would place an unreasonable burden on law enforcement. *Id.*, at 549. Instead, the Court held that under "single-factor exigency" it is objectively reasonable to conclude that the alcohol content in a defendant's blood dissipates with the passage of time due to the human body's

natural, physiological processes. *Id.*, at 548. A warrantless search is justified based on the imminent destruction of evidence when there is the potential loss of evidence during the delay necessary to obtain a warrant. *Id.* Since it is undisputed that the loss of the most probative evidence occurs during the time it takes to obtain a warrant, exigent circumstances are present based on the imminent destruction of evidence. *Id.*, at 549.

The Minnesota Supreme Court found that its conclusion was consistent with *Schmerber* and subsequent decisions of this Court. The Court cited *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), where this Court noted:

> [A]lcohol and other drugs are eliminated from the bloodstream at a constant rate, and blood and breath samples taken to measure whether these substances were in the bloodstream when a triggering event occurred must be obtained as soon as possible . . . the delay necessary to procure a warrant nevertheless may result in the destruction of valuable evidence.

Shriner, at 547 (quoting *Skinner*, 489 U.S. at 623).

The Minnesota Supreme Court also addressed the argument that the judgment in *Schmerber* was limited "only on the facts of the present record" and did not permit "more substantial intrusions, or intrusions under other conditions." *Shriner*, at 547 n.9 (quoting *Schmerber*, 385 U.S. at 774). The Court

concluded that "[t]his language, however, is properly analyzed as indicating that *Schmerber* should not be viewed as authorizing the police to take warrantless blood draws in circumstances other than when they suspect a person of drunk driving." *Shriner*, at 547 n.9.

In *State v. Netland*, 762 N.W.2d 202 (Minn. 2009), the Minnesota Supreme Court reaffirmed that the evanescent nature of the evidence creates the conditions that justify a warrantless search. *Id.*, at 213. There, the defendant had been charged with misdemeanor offenses for driving while intoxicated and refusing a chemical test. *Id.*, at 205-206. The Court noted that whether the degree of the underlying offense constitutes a felony or a lesser crime is immaterial to the circumstances created by the dissipating blood-alcohol evidence. *Id.*, 213. Rather, it is the chemical reaction of alcohol in the person's body that drives the conclusion on exigency. *Id.* The Court concluded that "no warrant is necessary to secure a blood-alcohol test where there is probable cause to suspect a crime in which chemical impairment is an element of the offense." *Id.*, at 214.[8]

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[8] The Ohio Supreme Court reached a similar conclusion in *State v. Hoover*, 916 N.E.2d 1056 (Ohio 2009). Discussing *Schmerber*, the Court stated, "[t]he United States Supreme Court has held that if an officer has probable cause to arrest a driver for DUI, the result of an analysis of a blood sample taken over the driver's objection and without consent is admissible in evidence, even if no warrant has been obtained." *Id.*, at 1060. The Court found this is so because "delaying the test to get a

(Continued on following page)

United States Court of Appeals for the Sixth Circuit

In *United States v. Berry*, 866 F.2d 887 (6th Cir. 1989), the Sixth Circuit upheld a warrantless blood draw against a Fourth Amendment challenge. The Court held that the search was reasonable because the officer had ample cause to believe the defendant was under the influence of alcohol, and because the method of testing was safe and reasonable. *Id.*, at 890. Reading *Schmerber* as an application of the exigent circumstances exception to the warrant requirement, the Sixth Circuit emphasized that the authorities in *Schmerber* had probable cause establishing that the results of the blood test would be positive. *Berry*, at 891. The Court found that because

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warrant would result in a loss of evidence." *Id.* Other state courts holding that the dissipation of alcohol in the bloodstream creates exigent circumstances under *Schmerber* include: the Arizona Supreme Court in *State v. Cocio*, 709 P.2d 1336, 1345 (Ariz. 1985) ("Because of the destructibility of the evidence, exigent circumstances existed. The highly evanescent nature of alcohol in the defendant's blood stream guaranteed that the alcohol would dissipate over a relatively short period of time."); the Maine Supreme Judicial Court in *State v. Baker*, 502 A.2d 489, 493 (Me. 1985) ("The bodily process that eliminates alcohol also provides exigent circumstances obviating the need to obtain a warrant prior to administering a blood test."); and the Idaho Supreme Court in *State v. Woolery*, 775 P.2d 1210, 1212 (Idaho 1989) ("The destruction of the evidence by metabolism of alcohol in the blood provides an inherent exigency which justifies the warrantless search."). See also the Hawaii Supreme Court in *State v. Entrekin*, 47 P.3d 336, 348 (Hawai'i 2002), and the California Supreme Court in *People v. Thompson*, 135 P.3d 3 (Cal. 2006).

evidence of intoxication begins to dissipate promptly, it was evident that there were exigent circumstances justifying the warrantless blood draw. *Id.* Although the defendant in *Berry* was involved in a serious accident resulting in physical injuries, the Sixth Circuit did not identify these facts as critical factors in its analysis. Instead, the Court simply concluded, "[w]e find no constitutional violation in police direction of qualified medical personnel at a medical institution or facility without a warrant to administer a blood test when the police have probable cause to suspect that the results of the blood test would be positive." *Id.*[9]

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[9] The Eighth Circuit has likewise relied on *Schmerber* to justify warrantless blood tests when the police have probable cause to conduct the tests. See *United States v. Prouse*, 945 F.2d 1017 (8th Cir. 1991), where the Court approved warrantless blood tests taken from defendants suspected of operating a commercial passenger airplane while under the influence of alcohol. Relying on *Schmerber*, the Court held that no warrant was needed because the "percentage of alcohol in the blood begins to diminish shortly after drinking stops." *Prouse*, at 1024 (discussing *Schmerber*, 384 U.S. at 770-771). See also *United States v. Eagle*, 498 F.3d 885 (8th Cir. 2007), where the Court found exigent circumstances exist when there is a risk of destruction of evidence, including a risk that a defendant's blood-alcohol content will dissipate because "the body functions to eliminate [alcohol] from the system." *Eagle*, at 893 (quoting *Schmerber*, 384 U.S. at 770-771).

United States Court of Appeals for the Fourth Circuit

United States v. Reid, 929 F.2d 990 (4th Cir. 1991), was a consolidation of two cases involving routine traffic stops on the George Washington Memorial Parkway. Both defendants showed signs of intoxication, failed field sobriety tests, and were arrested for driving while intoxicated. There were no accidents involved in either case, nor were there any physical injuries. The defendants argued that warrantless breath tests violated the Fourth Amendment. *Id.*, at 991-992. Relying on *Schmerber*, the Fourth Circuit held the warrantless breath tests were justified under the exigent circumstances exception to the warrant requirement. *Reid*, at 993. To support this position, the Fourth Circuit further relied on the decision of this Court in *Skinner, supra*, finding that *Skinner* "reiterated the notion that time is of the essence when there is a need to test alcohol in the body when it stated that 'the delay necessary to procure a warrant may nevertheless result in the destruction of valuable evidence.'" *Reid*, at 993 (quoting *Skinner*, 489 U.S. at 623).

The Fourth Circuit also rejected the argument that the availability of a procedure to obtain a search warrant over the telephone diminished the exigency. *Reid*, at 993. The Court examined the intricate requirements of obtaining such a warrant and concluded that the procedure did not alter the exigency of the situation. The Court stated, "[o]bviously, compliance

with these rules takes time. Time is what is lacking in these circumstances." *Id.*

B. Courts holding that *Schmerber* requires additional "special facts" other than the natural dissipation of alcohol in the bloodstream to create exigent circumstances justifying a warrantless blood draw

Utah Supreme Court

In *State v. Rodriguez*, 156 P.3d 771 (Utah 2007), the Utah Supreme Court considered whether the dissipation of alcohol in the bloodstream creates "per se" exigent circumstances justifying a warrantless blood draw under the Fourth Amendment. Addressing the State's contention that there is a recognized general exigency which applies to warrantless blood draws because of the destruction of evidence, the Court stated:

> Had the United States Supreme Court held that the Fourth Amendment permits police to conduct a warrantless blood draw whenever evidence of alcohol is present, the task before us would be easy. However, the fact that it has not so held places us in the position of following a course that is part divination and part pragmatism. We engage in divination when, employing what we might ambitiously call a principled approach to prophecy, we attempt to predict how the United States Supreme Court might decide the question before us. This is a perilous

> activity. As we will see when we take up the clearest pronouncement of the Supreme Court on the issue of alcohol and warrants, the Supreme Court could have created forty years ago the very categorical exigent circumstance rule for alcohol that the State now seeks. But it did not.

Id., at 774.

The Utah Supreme Court proceeded to analyze this Court's decision in *Schmerber*, finding that *Schmerber* requires the combination of three categories of "special facts" to create exigent circumstances. *Rodriguez*, at 776. The three categories of *Schmerber* "special facts" were identified by the Court as: (1) blood-alcohol content begins to drop shortly after drinking ends; (2) time had been taken to transport the defendant to a hospital and to investigate the accident scene; and (3) the necessity to seek out a magistrate and secure a warrant would require even more time. *Id.* The Court stated:

> Contrary to the assertion of the State, *Schmerber* does not stand for the proposition that the loss of evidence of a person's blood alcohol level through the dissipation of alcohol from the body was a sufficient exigency to justify a warrantless blood draw. Rather, these three categories of "special facts" combined to create the exigency. The evanescence of blood-alcohol was never special enough to create an exigent circumstance by itself.

Id., at 776.

To support its conclusion that the dissipation of alcohol in the bloodstream, without more, does not create exigent circumstances justifying a warrantless blood draw, the Court highlighted the following language in *Schmerber*: "that we today hold that the Constitution does not forbid the States' minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions." *Id.*, (quoting *Schmerber*, 384 U.S. at 772). The Court concluded that this "guarded language employed by Justice Brennan to define the Court's holding in *Schmerber* reinforces our conclusion that the Court did not intend a categorical recognition of blood-alcohol exigency." *Rodriguez*, at 776.

Ultimately, the Utah Supreme Court held that the warrantless blood draw in *Rodriguez* was reasonable under the "totality of the circumstances" because a serious accident resulting in a fatality had occurred. *Id.*, at 781. Although the Court was sharply critical of the police officers for not considering the possibility of obtaining a search warrant, the Court concluded the warrantless blood draw was reasonable under the "totality of the circumstances" because the passenger in the defendant's vehicle was expected to die. *Id.* "One fact dominates all others with respect to its relevance to whether the warrantless blood draw was reasonable: that [victim] was expected to succumb to her injuries." *Id.* The Court found that this fact "significantly altered the warrant acquisition calculus."

Id. The Court concluded that the "severity of the possible alcohol-related offense bears directly on the presence or absence of an exigency sufficient to justify a blood draw without a warrant." *Id.*

The Utah Supreme Court recognized that its interpretation of *Schmerber* was squarely at odds with the decision of the Wisconsin Supreme Court in *State v. Bohling, supra.* The Utah Supreme Court expressly disavowed the reasoning of the Wisconsin Supreme Court, asserting that its conclusion rested on "a flawed reading of *Schmerber*, and a misapplication of *Skinner.*" *Rodriguez,* at 777.

Iowa Supreme Court

In *State v. Johnson*, 744 N.W.2d 340 (Iowa 2008), the Iowa Supreme Court considered whether, and under what circumstances, the natural dissipation of alcohol in the bloodstream creates exigent circumstances justifying a warrantless blood draw. In its analysis, the Iowa Supreme Court noted that *Schmerber* has been discussed by cases from other jurisdictions with mixed conclusions. *Id.*, at 343. The Court proceeded to analyze and compare the interpretations of *Schmerber* by both the Wisconsin Supreme Court in *State v. Bohling, supra*, and the Utah Supreme Court in *State v. Rodriguez, supra. Johnson,* at 343-344. After comparing the two interpretations, the Iowa Supreme Court endorsed the Utah Supreme

Court's view in *Rodriguez*, agreeing that three separate categories of "special facts" must be combined to create the exigency. *Johnson*, at 344.

To support this interpretation, the Iowa Supreme Court placed emphasis on the following language in *Schmerber*: "[i]t bears repeating, however, that we reach this judgment only on the facts of the present record." *Id.*, at 344 (quoting *Schmerber*, 384 U.S. at 772). The Iowa Supreme Court maintained that the "present record" referred to in *Schmerber* showed that time had to be taken by the arresting officer to investigate the scene of the accident, to attend to injuries, and to process the defendant. *Johnson*, at 344. The Court concluded that "there was more underlying the seizure of blood in *Schmerber* than the mere phenomenon of alcohol dissipation." *Id.*

Ultimately, the Court held that the warrantless blood draw was justifiable because the facts of the case were sufficiently similar to the facts in *Schmerber*. *Id.* The Court relied on the fact that the defendant in *Johnson* was involved in an accident resulting in injuries to another person, the defendant attempted to leave the scene on foot, and the blood test was not administered until approximately two and a half hours after the accident. *Id.*, at 344. The Court was therefore satisfied that "time-based considerations similar to those in *Schmerber*" were present. *Id.*

C. The decision of the Missouri Supreme Court has deepened the division among state courts of last resort

The Missouri Supreme Court has adopted a narrow interpretation of *Schmerber*, following the reasoning of the Utah Supreme Court in *Rodriguez, supra*, and the Iowa Supreme Court in *Johnson, supra*. This has created a further division among state courts of last resort.[10] This emerging conflict on a fundamental Fourth Amendment issue will likely continue to divide both state and federal courts until this Court clarifies the holding in *Schmerber*. The intervention of this Court is imperative in order to facilitate uniform application of the Fourth Amendment.

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[10] The Missouri Supreme Court also asserted that its holding was consistent with the Ninth Circuit in *United States v. Chapel*, 55 F.3d 1416 (9th Cir. 1995). App., *infra*, 13a-14a. However, it appears to be at least somewhat unclear whether the Ninth Circuit would require a showing of additional "special facts" before allowing a warrantless blood draw. The Ninth Circuit simply held that there are three *Schmerber* requirements that must be met before a law enforcement officer may take a warrantless blood test: (1) the officer must have probable cause to believe the suspect has committed an offense of which the current state of one's blood will constitute evidence; (2) the officer must reasonably believe an emergency exists in which the delay necessary to obtain a warrant would threaten the loss or destruction of evidence; and (3) the procedures used to extract the sample must be reasonable and in accord with accepted medical practices. *Id.*, at 1419.

To illustrate the point, if a drunk driver traveling on an interstate highway were to be pulled over in the state of Wisconsin or Minnesota, law enforcement authorities would be permitted to obtain a warrantless blood test based upon their high courts' respective interpretations of this Court's decision in *Schmerber*. However, if this same drunk driver were able to cross the state line into Iowa before being pulled over, law enforcement authorities would be precluded from ordering a warrantless blood test based upon the Iowa Supreme Court's interpretation of *Schmerber*. This glaring conflict will not be reconciled until this Court takes action to clarify the holding in *Schmerber*.

II. The Missouri Supreme Court Misinterpreted This Court's Decision In *Schmerber v. California*, 384 U.S. 757 (1966) And Improperly Applied The Fourth Amendment

A. The Missouri Supreme Court misinterpreted *Schmerber*

The Missouri Supreme Court interpreted *Schmerber* to require additional exigency, beyond the natural dissipation of alcohol in the bloodstream, in order to justify a warrantless blood draw. To support this narrow reading, the Court relied extensively on language in *Schmerber* that it understood to be an explicit warning against expansive interpretations:

> It bears repeating, however, that we reach this judgment only on the facts of the present

> record. The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.

Schmerber, 384 U.S. at 772. App., *infra,* 18a-19a. The Missouri Supreme Court's reliance on what it understood to be an "explicit warning against expansive interpretations," however, is misplaced. This "explicit warning" was directed at the nature of the bodily intrusion itself, not on the underlying facts of the drunk-driving arrest. In the paragraph immediately preceding this "explicit warning," *Schmerber* emphasized that the intrusion at issue, the simple blood test, was performed in a reasonable manner. *Schmerber*, 384 U.S. at 771-772. Noting that the blood sample was taken by a physician in a hospital environment according to accepted medical practices, *Schmerber* proceeded to warn against procedures which might not be safe:

> We are thus not presented with the serious questions which would arise if a search involving use of a medical technique, even of the most rudimentary sort, were made by other than medical personnel or in other than a medical environment – for example, if it were administered by police in the privacy of the stationhouse. To tolerate searches under these conditions might be to invite an

> unjustified element of personal risk of infection or pain.

Id. *Schmerber* thus made it clear that blood tests performed by unqualified personnel in non-medical settings would not be tolerated. *Schmerber* made it equally clear that other, more invasive, bodily intrusions would likewise not be tolerated.

This Court was confronted with an example of a much more invasive bodily intrusion in *Winston v. Lee*, 470 U.S. 753 (1985). There, this Court held it was unreasonable under the Fourth Amendment to compel a robbery suspect to undergo a surgical operation to recover a bullet that had lodged in his chest. Finding that *Schmerber* provides the appropriate framework of analysis for cases involving surgical intrusions beneath the skin, this Court concluded that compelling a suspect to undergo a surgical procedure to recover a bullet was precisely the sort of example of the "more substantial intrusions" cautioned against in *Schmerber*. *Winston*, 470 U.S. at 755. In so holding, this Court reiterated that "*Schmerber* recognized society's judgment that blood tests do not constitute an unduly extensive imposition on an individual's personal privacy and bodily integrity." *Id.*, at 762.

Indeed, this Court has long recognized that a simple blood test is a minor intrusion for constitutional purposes. In *Breithaupt v. Abram*, 352 U.S. 432 (1957), this Court recognized that "[t]he blood test procedure has become routine in our everyday life."

Id., at 436. Holding that there is nothing 'brutal' or 'offensive' in the taking of a blood sample when done under the protective eye of a physician, this Court found that a simple blood test "would not be considered offensive by even the most delicate." *Id.*, at 435-436. Later, in *South Dakota v. Neville*, 459 U.S. 553 (1983), this Court noted that "[t]he simple blood-alcohol test is so safe, painless, and commonplace . . . that the state could legitimately compel the suspect, against his will, to accede to the test." *Id.*, at 563. There, this Court plainly stated, "*Schmerber* . . . clearly allows a State to force a person suspected of driving while intoxicated to submit to a blood alcohol test." *Id.*, at 559.

B. It is objectively reasonable for a law enforcement officer to obtain a warrantless blood test from a drunk driver because of the imminent destruction of evidence

It is a basic principle of Fourth Amendment law that searches and seizures conducted without a warrant are presumptively unreasonable. See *Katz v. United States*, 389 U.S. 347, 357 (1967). Because the ultimate touchstone of the Fourth Amendment is "reasonableness," however, the warrant requirement is subject to certain exceptions. *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). An action is "reasonable" under the Fourth Amendment, regardless of the individual police officer's state of mind, as long as the circumstances, viewed objectively, justify the

action. *Id.*, at 404. Although a search warrant must generally be secured before conducting a search, this Court has recognized that "the exigencies of the situation" may make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment. *Id.* (quoting *Mincey v. Arizona*, 437 U.S. 385, 394 (1978)).

This Court has identified several exigencies that may justify a warrantless search, including the hot pursuit of a fleeing suspect, *United States v. Santana*, 427 U.S. 38, 42-43 (1976), the need to render emergency assistance or protect a person from imminent injury, *Brigham City,* 547 U.S. at 403, and the need to prevent the imminent destruction of evidence, *Kentucky v. King*, 131 S.Ct. 1849, 1856 (2011). Indeed, in *King* this Court stated that "[i]t is well established that 'exigent circumstances,' including the need to prevent the destruction of evidence, permit police officers to conduct an otherwise permissible search without first obtaining a warrant." *Id.*, at 1853-1854. Thus, when a law enforcement officer has probable cause to conduct a search, a warrantless search will be justified under the exigent circumstances exception to the warrant requirement if the officer has an objectively reasonable belief there is a risk that evidence will be destroyed during the delay necessary to obtain a search warrant.

There can be no dispute that the level of alcohol in the bloodstream of a drunk driver is highly probative evidence. This Court has recognized that blood tests are exceptionally probative in drunk-driving

prosecutions, finding that they are "a highly effective means of determining the degree to which a person is under the influence of alcohol." *Schmerber*, 384 U.S. at 771. See also *Breithaupt, supra,* 352 U.S. at 439 (noting that blood tests are "a scientifically accurate method of detecting alcoholic content in the blood, thus furnishing an exact measure upon which to base a decision as to intoxication."); *Winston, supra,* 470 U.S. at 763 ("Especially given the difficulty of proving drunkenness by other means . . . results of the blood test were of vital importance if the State were to enforce its drunken driving laws.").

There can also be no dispute that the level of alcohol in the bloodstream of a drunk driver is subject to destruction by the body's natural, physiological processes. In *Schmerber*, this Court found that that the arresting officer might reasonably have believed he was confronted with an emergency in which the delay necessary to obtain a warrant threatened the destruction of evidence because "the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system." *Schmerber,* 384 U.S. at 770. In *Skinner, supra*, this Court recognized that because alcohol is eliminated from the bloodstream at a constant rate, "blood and breath samples taken to measure whether these substances were in the bloodstream when a triggering event occurred must be obtained as soon as possible" and that "the delay necessary to procure a warrant nevertheless may

result in the destruction of valuable evidence." *Skinner*, *supra*, 489 U.S. at 623.

Blood alcohol evidence is extraordinarily unique precisely because it is an indisputable fact that alcohol is naturally eliminated from the human body. The exigency involved in quickly securing blood alcohol evidence is even more compelling than other situations where there is a risk of destruction of evidence because the alcohol in a suspect's blood is *certain* to disappear, while other types of evidence may only be very likely to disappear. See *State v. Cocio,* 709 P.2d 1336, 1345 (Ariz. 1985). See also 3 W. LaFave, *Search and Seizure*, § 5.4(b), at 199 (4th ed. 2004) (discussing blood alcohol evidence and noting that "the 'evanescent' character of the evidence is inherent in its nature and does not depend upon any motive of the defendant to destroy it.") As the Oregon Supreme Court recently stated in *State v. Machuca*, 227 P.3d 729, 736 (Or. 2010), the focus of the courts should be on the exigency created by blood alcohol dissipation, not on the speed with which a search warrant could presumably be obtained.

The decision of the Missouri Supreme Court, however, actually *requires* police officers to stand by and allow the best, most probative evidence to be destroyed during a drunk-driving investigation. This is wholly inconsistent with core principles of the Fourth Amendment. Proper application of the Fourth Amendment must take into account the need for the police to act quickly in order to prevent the destruction of evidence. When a law enforcement officer has

probable cause to arrest a person for a drunk-driving related crime, it is certainly objectively reasonable to conclude that blood alcohol evidence will continue to dissipate during the inevitable delay necessary to obtain a search warrant. Under these circumstances, it is reasonable for an officer to direct medical personnel at a hospital to draw a blood sample from a drunk driver without first obtaining a search warrant. This comports with Fourth Amendment standards of reasonableness.

III. The Question Presented Is Of Substantial And Recurring Importance

Drunk driving is a serious problem on public roads and highways throughout the United States. This Court is well aware of the dangers posed by drunk drivers. Summarizing the problem over twenty years ago, this Court stated:

> No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it. Media reports of alcohol-related death and mutilation on the Nation's roads are legion. The anecdotal is confirmed by the statistical. 'Drunk drivers cause an annual death toll of over 25,000 and in the same time span cause nearly one million personal injuries and more than five billion dollars in property damage.' For decades, this Court has 'repeatedly lamented the tragedy.' 'The increasing slaughter on our highways . . . now reaches the astounding figures only heard of on the battlefield.'

Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990) [citations omitted].

Proper and consistent application of the Fourth Amendment is essential in order for law enforcement to effectively enforce drunk-driving laws throughout the United States. This Court's resolution of the question presented is critically important to law enforcement efforts to promote public safety by ridding our roads and highways of drunk drivers, efforts which have been constrained by misinterpretation of this Court's decision in *Schmerber* and improper application of the Fourth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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358 S.W.3d 65

Supreme Court of Missouri,
En Banc.
STATE of Missouri, Appellant,
v.
Tyler G. McNEELY, Respondent.

No. SC 91850.
Jan. 17, 2012.
Rehearing Denied March 6, 2012.

John N. Koester Jr., Cape Girardeau County Prosecuting Attorney's Office, Cape Girardeau, for State.

Stephen C. Wilson, Wilson & Mann LC, Cape Girardeau, for McNeely.

Stephen D. Bonney, Kansas City, for amicus curiae American Civil Liberties Union of Eastern Missouri and American Civil Liberties Union of Western Missouri.

Talmage E. Newton IV, St. Louis, for amicus curiae Missouri Association of Criminal Defense Lawyers.

James B. Farnsworth, Jefferson City, for amicus curiae Attorney General's Office.

PER CURIAM.

Tyler McNeely (Defendant) refused to consent to an alcohol breath test or a blood test after he was arrested for driving while intoxicated. The arresting patrolman, without seeking a warrant from a judge, ordered a medical professional to draw Defendant's blood. The trial court sustained Defendant's motion to

suppress the results of the blood test as the nonconsensual and warrantless blood draw was a violation of his Fourth Amendment rights.

The issue before the Court in this interlocutory appeal is: Under what "special facts" is a nonconsensual and warrantless blood draw in a DWI case a reasonable search and seizure under the Fourth Amendment?

This Court recognizes the two competing interests involved in answering that question, namely, society's interest in preventing the harms caused by drunken driving and an individual's Fourth Amendment right to be secure in his or her person and to be free of unreasonable searches and seizures.

The United States Supreme Court addressed this issue in the landmark case of *Schmerber v. California,* 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). There, the Supreme Court provided a limited exception to the warrant requirement for the taking of a blood sample in alcohol-related arrests. *Id.* at 772, 86 S.Ct. 1826. The holding, which was expressly limited to the facts of that case, ultimately rested on certain "special facts" that might have led the officer to reasonably believe he was faced with an emergency situation in which the delay in obtaining a warrant would threaten the destruction of evidence. *Id.* at 770-71, 86 S.Ct. 1826. The threat of evidence destruction was caused by the fact that the percentage of alcohol in a person's blood begins to diminish shortly after drinking stops and because time had to be taken

both to investigate the accident scene and transport the defendant to the hospital. *Id.* These events left no time for the officer to seek out a judge to secure a search warrant. *Id. Schmerber* held that these "special facts" permitted a warrantless blood draw. *Id.* at 771, 86 S.Ct. 1826.

The patrolman here, however, was not faced with the "special facts" of *Schmerber.* Because there was no accident to investigate and there was no need to arrange for the medical treatment of any occupants, there was no delay that would threaten the destruction of evidence before a warrant could be obtained. Additionally, there was no evidence here that the patrolman would have been unable to obtain a warrant had he attempted to do so. The sole special fact present in this case, that blood-alcohol levels dissipate after drinking ceases, is not a *per se* exigency pursuant to *Schmerber* justifying an officer to order a blood test without obtaining a warrant from a neutral judge.

The judgment of the trial court is affirmed.[1]

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[1] Affirming the trial court's decision granting the motion to suppress does not result in the dismissal of the case against Defendant. Instead, the state may proceed in the prosecution of the DWI charge against Defendant based on other evidence not gathered in violation of the Constitution.

I. Facts

A Missouri state highway patrolman, while performing his patrol, stopped Defendant's truck for speeding at 2:08 a.m. As the patrolman spoke with Defendant during the routine traffic stop, he noticed that Defendant displayed the tell-tale signs of intoxication – bloodshot eyes, slurred speech, and the smell of alcohol on his breath. These observations changed the nature of the patrolman's investigation from a routine traffic stop to a DWI investigation. He asked Defendant to step out of the vehicle and to perform standard field-sobriety tests. Defendant performed the tests poorly, and the patrolman placed Defendant under arrest for driving while intoxicated. After securing Defendant in the patrol car, the patrolman asked him if he would consent to a breath test. Defendant refused.

The patrolman testified that, in his more than 17 years of experience, he had obtained warrants when he needed to test the blood of DWI suspects. This time, however, he was influenced by an article he previously had read, written by a traffic safety resource prosecutor, in "Traffic Safety News." He testified that the article asserted officers no longer needed to obtain a warrant before requiring DWI suspects to submit to nonconsensual blood tests because of recent changes in Missouri's implied consent law.[2] Based on

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[2] The article, *Warrantless Blood Draws: Are They Now Authorized in Missouri?*, acknowledged that the former version of section 577.041.1 stated that if a person refused both the

(Continued on following page)

this understanding, the patrolman did not seek a warrant and drove Defendant to the local hospital to test his blood to secure evidence of his intoxication. There, Defendant refused to consent to a blood draw. Over Defendant's refusal, the patrolman directed a phlebotomist to draw Defendant's blood for alcohol testing at 2:33 a.m. The blood sample was analyzed, and the results revealed that Defendant's blood-alcohol content was well above the legal limit.

Defendant moved to suppress the results of the blood test as a violation of his Fourth Amendment rights. The trial court sustained the motion. The State brings this interlocutory appeal.[3]

II. Standard of Review

A trial court's ruling on a motion to suppress will be reversed only if it is clearly erroneous. *State v. Sund*, 215 S.W.3d 719, 723 (Mo. banc 2007). This Court defers to the trial court's factual findings and

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breath-analyzer and the blood draw test, then "none shall be given." Section 577.041.1, RSMo Supp.2008. However, that section was amended prior to Defendant's arrest by the deletion of the phrase "and none shall be given." Section 577.041.1, RSMo. Supp.2010. With the removal of that phrase, the prosecutor asserted that police officers now may "rely on the well settled principle that obtaining blood from an arrestee on probable cause without a warrant and without actual consent does not offend constitutional guarantees." The prosecutor's assertion rests on a fundamental misreading of *Schmerber*.

[3] This Court has jurisdiction pursuant to article V, section 10 of the Missouri Constitution.

credibility determinations and considers all evidence and reasonable inferences in the light most favorable to the trial court's ruling. *Id.* Whether conduct violates the Fourth Amendment is a question of law, which is reviewed *de novo*. *Id.*

III. Analysis

The issue before this Court is whether the natural dissipation of blood-alcohol evidence is alone a sufficient exigency to dispense with the warrant requirement under the Fourth Amendment.

The Fourth Amendment to the United States Constitution ensures "[t]he right of the people to be secure in their person . . . against unreasonable searches and seizures." The United States Supreme Court has repeatedly held that "searches conducted outside the judicial process, without prior approval by judge or magistrate are *per se* unreasonable under the Fourth Amendment – subject to only a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

An exception to the general rule requiring a search warrant is when exigent circumstances are present. *United States v. Cisneros-Gutierrez*, 598 F.3d 997, 1004 (8th Cir.2010). Exigent circumstances exist if the time needed to obtain a warrant would endanger life, allow a suspect to escape, or risk the destruction of evidence. *Id.*

Every Fourth Amendment analysis requires the balancing of two competing interests: (1) the right of the individual to be secure in his or her person, house, papers, and effects against unreasonable searches and seizures and (2) society's interest in discovering and eliminating criminal activity. *Schmerber* recognized this essential and inevitable struggle of the Fourth Amendment:

> Search warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned. The requirement that a warrant be obtained is a requirement that the inferences to support the search "be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great.

384 U.S. at 770, 86 S.Ct. 1826 (quoting *Johnson v. United States*, 333 U.S. 10, 13-14, 68 S.Ct. 367, 92 L.Ed. 436 (1948)) (internal citations omitted).

A. Schmerber v. California

Schmerber provides the backdrop to this Court's analysis in the case at hand. In *Schmerber*, the defendant was driving a vehicle that skidded off the

road. *Id.* at 758 n. 2, 86 S.Ct. 1826. He and his passenger were injured and taken to the hospital for treatment. *Id.* At the hospital, the defendant was arrested and, without his consent or a warrant, an officer directed a physician to take a sample of the defendant's blood. *Id.* at 758, 86 S.Ct. 1826. Analysis of the blood sample revealed that the defendant was intoxicated. *Id.* at 759, 86 S.Ct. 1826. The defendant objected to the trial court's receipt of the blood sample evidence, contending that the warrantless blood draw violated his Fourth Amendment right to be free from unreasonable searches and seizures. *Id.*

The Supreme Court reasoned that drawing an individual's blood for evidentiary purposes is a search that implicates the Fourth Amendment. *Id.* at 769-70, 86 S.Ct. 1826. Ordinarily a search warrant would be required to perform a blood draw when a person does not consent. *Id.* at 770, 86 S.Ct. 1826. The circumstances in *Schmerber,* however, led the Supreme Court to carve out a very limited exception to the warrant requirement for a blood draw in alcohol-related cases. *Id.* at 772, 86 S.Ct. 1826. The limited exception of *Schmerber* ultimately rested on certain "special facts" that might have caused the officer to reasonably believe he was faced with an emergency situation in which the delay in obtaining a warrant would threaten the destruction of evidence. *Id.* at 770-71, 86 S.Ct. 1826. The threat of evidence destruction was caused by the fact that the percentage of alcohol in a person's blood begins to diminish shortly after drinking stops and because there was an

accident requiring time to be taken to both transport the defendant to the hospital and to investigate the scene of the accident. *Id.* Given those "special facts" the Supreme Court concluded that the warrantless search was valid incident to the defendant's arrest. *Id.* at 771, 86 S.Ct. 1826. Although *Schmerber* couched its limited exception to the warrant requirement in terms of a search incident to arrest, it has since been read as an application of the exigent circumstances exception to the warrant requirement. *United States v. Berry,* 866 F.2d 887, 891 (6th Cir.1989).

The State urges that *Schmerber* gives officers the broad authority to direct medical professionals to conduct warrantless and nonconsensual blood draws on DWI defendants on mere probable cause of intoxication. The State asserts that the dissipating nature of blood-alcohol evidence alone constitutes a sufficient exigency to dispense with the warrant requirement in alcohol-related cases.

Schmerber, however, requires more than the mere fact that alcohol naturally dissipates in the blood stream. Instead, it requires a showing of "special facts" to provide an exigency to conduct a warrantless bodily intrusion. *Schmerber,* 384 U.S. at 770-71, 86 S.Ct. 1826. The "special facts" present in *Schmerber* included the time delay created by the investigation of the accident as well as the transportation of the defendant to the hospital. *Id.* These "special facts" might have caused the officer to reasonably believe he was faced with an emergency situation in which the

further delay in obtaining a warrant would threaten the destruction of evidence. *Id.* Under this limited fact situation, *Schmerber* held a nonconsensual, warrantless blood draw was permissible under the Fourth Amendment. *Id.* at 772, 86 S.Ct. 1826. This interpretation of *Schmerber* is supported by other jurisdictions that have addressed this issue.

B. *Other Jurisdictions That Have Addressed* Schmerber *Have Held That "Special Facts" Beyond the Natural Dissipation of Blood-Alcohol Are Required*

Since *Schmerber,* several courts have addressed whether *Schmerber*'s holding allows for nonconsensual, warrantless blood draws in routine DWI cases. The Supreme Court of Utah held that the dissipating nature of blood-alcohol evidence alone is not a *per se* exigency justifying a warrantless search. *State v. Rodriguez,* 156 P.3d 771, 772 (Utah 2007). In *Rodriguez,* the defendant was critically injured in a serious automobile accident and was rushed to the hospital. *Id.* An officer went to the hospital where the defendant was being treated and observed the odor of alcohol on her breath, slurred speech, red eyes, and belligerent behavior. *Id.* Blood was drawn from the defendant through an IV line that the hospital staff had previously inserted in her arm. *Id.* The analysis of her blood revealed that her blood-alcohol level was five times the legal limit in Utah. *Id.* At trial, the defendant moved to suppress the evidence obtained from the warrantless blood draw. *Id.*

Rodriguez, in analyzing *Schmerber,* stated: "The evanescence of blood-alcohol was never special enough to create an exigent circumstance by itself." *Id.* at 776. Instead, the Utah court reasoned, *Schmerber*'s exigent circumstances exception to the warrant requirement rested on all of the "special facts" of *Schmerber,* and the natural dissipation of blood-alcohol was only one of those "special facts." *Id. Rodriguez* adopted a totality of the circumstances test for the determination of whether there exists a sufficient exigency justifying a warrantless blood draw. *Id.* at 782. *Rodriguez* reasoned that the seriousness of the accident in the case, coupled with the compelling evidence of the defendant's alcohol impairment, was "sufficient to establish that the interests of law enforcement outweighed, in this instance, [the defendant's] privacy interests." *Id.* at 781. The Supreme Court of Utah held that, given the totality of the circumstances, probable cause and exigent circumstances justified a warrantless blood draw in the case before it. *Id.* at 782.

Similarly, the Supreme Court of Iowa noted that *Schmerber* rejected the notion that the natural dissipation of blood-alcohol constituted a *per se* exigency justifying a warrantless blood draw. *State v. Johnson,* 744 N.W.2d 340, 344 (Iowa 2008). In *Johnson,* the defendant was involved in a car accident that caused serious injury to the driver of another car. *Id.* at 341. After the accident, the defendant fled the scene on foot, but the police tracked him down not far from the scene. *Id.* He was arrested and taken to the police

station, where he refused a breath test. *Id.* Subsequently, he was taken to the hospital, and a blood sample was drawn without a warrant and without his consent. *Id.* Analysis of his blood revealed that his blood-alcohol concentration was well above the legal limit in Iowa. *Id.* The defendant moved to suppress the results of the blood test. *Id.*

Johnson analyzed the admissibility of a warrantless blood draw performed in accordance with an Iowa statute authorizing such draws. *Id.*[4] The defendant argued that the officer was not faced with an "emergency" under the Iowa statute. *Id.* The Iowa court found that there were *Schmerber*-like time-based considerations present in the case before it because the officer had to take time to investigate the scene, track down the fleeing defendant, administer sobriety tests, and transport him to the police station and hospital. *Id.* at 344. Two and a half hours after the accident, officers were finally able to draw the

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[4] The Iowa statute in question closely tracked the rationales of *Schmerber,* allowing a nonconsensual, warrantless blood draw when the operator of a motor vehicle is arrested for an "accident that causes a death or personal injury reasonably likely to cause death" when three additional elements are present: (1) the officer reasonably believes the blood drawn will produce evidence of intoxication; (2) the blood is drawn by a medical personnel; and (3) the officer reasonably believes that he or she is confronted with an emergency situation in which the delay necessary to obtain a warrant threatens the destruction of the evidence. *Id.* at 342 (quoting Iowa Code section 321J.9 (2005)).

defendant's blood. *Id. Johnson* held that the warrantless blood draw was permissible because the officer, in investigating a serious injury accident, "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence." *Id.* at 342-43 (quoting *Schmerber,* 384 U.S. at 770, 86 S.Ct. 1826). The Supreme Court of Iowa rejected the idea that *Schmerber* created a *per se* exigency based on the nature of blood-alcohol alone. *Id.* at 344. Instead, it noted that "there was more underlying the seizure of blood in *Schmerber* than the mere phenomenon of alcohol dissipation." *Id.*

Finally, the Ninth Circuit held that an arrest is not a constitutional prerequisite to a warrantless blood draw in *United States v. Chapel,* 55 F.3d 1416, 1420 (9th Cir.1995). In so holding, the court discussed the constitutionality of nonconsensual, warrantless blood draws. It reasoned that although a nonconsensual, warrantless blood draw may be based upon probable cause instead of requiring an arrest, *Schmerber* requires more:

> In addition to probable cause, the other *Schmerber* requirements remain in place. The officer must still reasonably believe that an emergency exists in which the delay necessary to obtain a warrant would threaten the loss or destruction of evidence. The procedures used to extract the sample must still

> be reasonable and in accordance with accepted medical practices.

Id. at 1419.

Chapel's interpretation of *Schmerber* is consistent with this Court's holding today. The DWI defendant in *Chapel* had been severely injured in a motorcycle accident; therefore, the officer was faced with an emergency situation that – taken with the natural dissipation of blood-alcohol, the accident investigation, and the hospital transportation time delay – constituted exigent circumstances justifying a nonconsensual, warrantless blood draw. *See id.* at 1417-20.

Contrary to the State's assertion, no case in Missouri supports a *per se* rule that the natural dissipation of blood-alcohol is alone sufficient to constitute exigent circumstances that would permit officers in every DWI case to take blood from a suspect without consent or a search warrant.[5] The State

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[5] The State cites *State v. Ikerman* and *State v. Setter* to support its position that warrantless blood draws are permissible in DWI cases, but both of these cases applied *Schmerber* in terms of a search incident to arrest. *Setter*, 721 S.W.2d 11, 16 (Mo.App.1986); *Ikerman*, 698 S.W.2d 902, 904-05 (Mo.App.1985). The State acknowledges, however, that "[w]hile *Schmerber* casts its decision in terms of the 'search incident to arrest' exception to the warrant requirement, it has since been read as an application of the 'exigent circumstances' exception." Appellant's Substitute Brief at 17; *See also Berry*, 866 F.2d at 891; *Rodriguez*, 156 P.3d at 776; *Johnson*, 744 N.W.2d at 342; *State v. Shriner*, 751 N.W.2d 538, 543 (Minn.2008); *Chapel*, 55 F.3d at

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argues that *State v. LeRette* supports its position. 858 S.W.2d 816 (Mo.App.1993). In *LeRette,* the defendant was the driver of an automobile involved a serious-injury accident. *Id.* at 817. When the officer arrived at the scene, emergency personnel were loading the defendant into an ambulance. *Id.* While investigating the accident, the officer found several beer cans among the wreckage debris, including a half-empty can. *Id.* Later, at the hospital, the officer found the defendant with a tube down his throat and unable to communicate. *Id.* The officer directed a hospital employee to take a blood sample from the defendant for the purpose of determining his blood-alcohol content. *Id. LeRette* justified the warrantless blood draw based on the facts that the percentage of alcohol in the bloodstream diminishes with time and that the delay caused by having to obtain a warrant might result in the destruction of evidence. The court stated that "both prongs of the exigent circumstances exception were established – probable cause that incriminating evidence would be found and exigent circumstances justifying the search." *Id.* at 819. While the court in *LeRette* did not specifically identify the exigent circumstances, it is significant to note that there was some passage in time for the officer to remain at the scene to do investigatory work while

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1418; *State v. Bohling,* 173 Wis.2d 529, 494 N.W.2d 399, 402 (1993). To the extent that *Ikerman* and *Setter* interpret *Schmerber* to allow a nonconsensual warrantless blood draw incident to arrest in DWI cases without other exigent circumstances, they are no longer to be followed.

the defendant was taken to the hospital. *See id.* at 817. Further, when the officer later arrived at the hospital, he was confronted with an individual with whom he could not communicate. *Id.* at 817.

The factual circumstances in *LeRette* are significantly different from the case here, as notably *LeRette* involved an accident that required investigation and a further time delay when the driver was taken to a hospital for treatment, unlike the routine DWI stop in this case. *LeRette* embodied a straight forward application of the "special facts" of emergency contemplated by *Schmerber*, in that the DWI suspect in *LeRette* – just as the defendant was in *Schmerber* – was involved in a serious-injury accident that caused a time delay in both the investigation of the accident and the transportation of the defendant to the hospital. *Id.* at 819.[6]

C. This Court Disagrees with Jurisdictions That Have Adopted a Per Se *Exigency Analysis*

In contrast to the forgoing, Wisconsin, Oregon, and Minnesota have adopted the rationale that the rapid dissipation of alcohol alone constitutes a sufficient exigency to draw blood without a warrant. *State*

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[6] To the extent that *LeRette* could be read as permitting a warrantless blood draw based on the mere fact that alcohol diminishes in the blood stream over time, it is no longer to be followed.

v. Bohling, 173 Wis.2d 529, 494 N.W.2d 399, 406 (1993); *State v. Machuca,* 347 Or. 644, 227 P.3d 729, 736 (2010); *State v. Netland,* 762 N.W.2d 202, 212-13 (Minn.2009). In a 4-3 decision, the Supreme Court of Wisconsin stated:

> *Schmerber* can be read in either of two ways: (a) that the rapid dissipation of alcohol in the bloodstream alone constitutes a sufficient exigency for a warrantless blood draw to obtain evidence of intoxication following a lawful arrest for a drunk driving related violation or crime – as opposed to taking a blood sample for other reasons, such as to determine blood type; or (b) that the rapid dissipation of alcohol in the bloodstream, coupled with an accident, hospitalization, and the lapse of two hours until arrest, constitute exigent circumstances for such a blood draw.

Bohling, 494 N.W.2d at 402. The Wisconsin court believed that that the more reasonable interpretation of *Schmerber* was the former. *Id.* It reasoned that the exigency in *Schmerber* was caused "solely" by the fact that alcohol dissipates in a person's blood stream over time. *Id. Bohling* held that a warrantless blood draw is permitted when a person is lawfully arrested for a drunken-driving related crime and there is a clear indication that the evidence obtained will produce evidence of intoxication. *Id.* at 406.[7]

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[7] In a subsequent 4-3 decision, the Supreme Court of Wisconsin extended its holding in *Bohling* to permit nonconsensual, warrantless blood draws even when the defendant has

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Similarly, the Supreme Court of Oregon held that the natural dissipation of a defendant's blood-alcohol is an exigent circumstance that will "ordinarily permit a warrantless blood draw." *Machuca,* 227 P.3d at 736 (relying on its prior interpretation of *Schmerber* in *State v. Milligan,* which stated "the evanescent nature of the evidence sought . . . constitutionally justifies [a warrantless blood draw]." 304 Or. 659, 748 P.2d 130, 136 (1988)).

Finally, a divided Supreme Court of Minnesota held that the natural dissipation of alcohol in the blood creates "single-factor exigent circumstances" that justify a warrantless, nonconsensual blood draw. *Netland,* 762 N.W.2d at 212-213 (citing *State v. Shriner,* 751 N.W.2d 538, 549-50 (Minn.2008)). *Shriner* interpreted the *Schmerber* exigency to rest only on the fact that the "percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system." *Shriner,* 751 N.W.2d at 545 (quoting *Schmerber,* 384 U.S. at 770, 86 S.Ct. 1826; internal quotation marks omitted).

This Court cannot agree with these interpretations of *Schmerber.* In *Schmerber,* the Supreme Court rejected a *per se* exigency and explicitly warned against such expansive interpretations:

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consented and submitted to a breath test. *State v. Faust,* 274 Wis.2d 183, 682 N.W.2d 371, 379 (2004).

> It bears repeating, however, that we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits . . . intrusions under other conditions.

Schmerber, 384 U.S. at 772, 86 S.Ct. 1826. *Schmerber* requires some exigency beyond the mere natural dissipation of blood-alcohol evidence. It explicitly found that the time delay that resulted from both the investigation of the accident and the transportation of the defendant to the hospital were "special facts" that authorized a warrantless blood draw under the Fourth Amendment. *Id.* at 770-71, 86 S.Ct. 1826. To allow a warrantless blood draw in the absence of such "special facts" would be to ignore the Supreme Court's statement in *Schmerber* that the Constitution in no way permits warrantless blood draws "under other conditions." *Id.* at 772, 86 S.Ct. 1826.

IV. Conclusion

Schmerber reaffirms that warrantless intrusions of the body are not to be undertaken lightly and that exigency is to be determined by the unique facts and circumstances of each case. *Schmerber* directs lower courts to engage in a totality of the circumstances analysis when determining whether exigency permits

a nonconsensual, warrantless blood draw. It requires more than the mere dissipation of blood-alcohol evidence to support a warrantless blood draw in an alcohol-related case. *Schmerber,* 384 U.S. at 770-71, 86 S.Ct. 1826. Officers must reasonably believe that they are confronted with an emergency where the delay in obtaining a warrant would threaten the destruction of evidence. *Id.* at 770, 86 S.Ct. 1826. The question of whether an emergency exists sufficient to trigger the exigent circumstances exception to the warrant requirement heavily depends on the existence of "special facts" and must be determined on a case-by-case basis. In routine DWI cases, in which no "special facts" exist other than the natural dissipation alcohol in the blood, a warrant must be obtained before such evidence is gathered. This requirement ensures that the inferences to support the blood draw be made by a neutral and detached judge "instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson,* 333 U.S. at 13-14, 68 S.Ct. 367. The warrant requirement is especially important when the issue is "whether or not to invade another's body in search of evidence of guilt." *Schmerber,* 384 U.S. at 770, 86 S.Ct. 1826.

Defendant's case is unquestionably a routine DWI case. Although his body was working naturally to expunge the alcohol in his system, there were no other "special facts" of exigency in his case. There was no accident to investigate and no injuries to attend to that required the patrolman to expend time, delaying

his request of Defendant to submit to blood-alcohol testing. The patrolman could not identify any exigent circumstances and made no attempt to obtain a search warrant. The nonconsensual, warrantless blood draw was taken only 25 minutes after Defendant was stopped. Time-based considerations similar to those in *Schmerber* were not present here.[8] There were no "special facts" in this case, other than the natural dissipation of blood-alcohol, that indicated the arresting patrolman was faced with an emergency where the delay in obtaining a warrant would threaten the destruction of evidence. He was not justified, therefore, in failing to seek a warrant before drawing Defendant's blood over his refusal to consent.[9]

Defendant's Fourth Amendment right to be free from unreasonable searches of his person was violated, and the trial court's judgment sustaining Defendant's motion to suppress is affirmed. The State may go forward in the prosecution of the DWI charge against Defendant based on evidence gathered in

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[8] For example, in *Johnson*, more than two and a half hours had passed between the accident and the warrantless blood draw. *Johnson*, 744 N.W.2d at 344. In *Schmerber*, the exact time that had elapsed was not reflected in the opinion, but the investigation of the accident and the transportation of the defendant to the hospital caused a time delay. *Schmerber*, 384 U.S. at 770-71, 86 S.Ct. 1826.

[9] Because the warrantless blood draw in this case was a violation of Defendant's Fourth Amendment right to be free from unreasonable searches, there is no need to address the State's arguments based on Missouri's implied consent law.

conformity with the Constitution. The case is remanded.

TEITELMAN, C.J., RUSSELL, BRECKENRIDGE, FISCHER, STITH, and PRICE, JJ., and ASEL, Sp.J. concur.

DRAPER, J. not participating.

2011 WL 2455571

Missouri Court of Appeals,
Eastern District,
Division Four.
STATE of Missouri, Appellant,
v.
Tyler G. McNEELY, Respondent.

No. ED 96402.
June 21, 2011.
Transferred to 2012 WL 135417.

Appeal from the Circuit Court of Cape Girardeau County, Benjamin F. Lewis, Judge. John N. Koester, Prosecuting Atty. For Cape Girardeau County, Jackson, MO, for appellant.

Stephen C. Wilson, Cape Girardeau, MO, for respondent.

ROBERT G. DOWD, JR., Judge.

The State of Missouri appeals from the trial court's grant of Tyler G. McNeely's ("Defendant") motion to suppress evidence. Defendant was charged with driving while intoxicated, Section 577.010, RSMo 2000.[1] In its sole point, the State argues the trial court erred in granting Defendant's motion to suppress the blood sample seized from Defendant's person after he was arrested for driving while intoxicated because the sample was taken without Defendant's consent and

[1] All further statutory references are to RSMo 2000, unless otherwise indicated.

without a search warrant. We would reverse; however, in light of the general interest and importance of the issues involved, we transfer the case to the Missouri Supreme Court, pursuant to Supreme Court Rule 83.02.

On October 3, 2010, Corporal Mark Winder ("Corporal Winder") observed Defendant driving above the posted speed limit. As he was following Defendant before he pulled him over, Corporal Winder observed Defendant crossing the center line of the road three times. When he made contact with Defendant, he detected "a strong odor of intoxicants on his breath and his eyes were glassy and bloodshot." Defendant stated he had a couple of beers, and when Corporal Winder asked him to step out of the vehicle, he was unstable on his feet and swayed while maintaining his balance.

Corporal Winder administered four field sobriety tests on Defendant, and Defendant performed poorly on each of them. Defendant refused to give a breath sample into a portable breath tester and was subsequently placed under arrest for driving while intoxicated.

Corporal Winder began to transport Defendant to the Cape Girardeau County Jail to administer a breath test, but Defendant stated he would refuse to take a breath test. Thus, Corporal Winder transported Defendant to the St. Francis Medical Center Lab to obtain a blood sample.

Corporal Winder read Defendant the Missouri Implied Consent and asked that he provide a blood sample. Defendant refused. Corporal Winder informed Defendant that, pursuant to Missouri law, he was going to obtain the blood sample against his refusal. At that point, a lab technician withdrew a blood sample from Defendant. The sample showed Defendant's blood-alcohol level was 0.154 percent. Corporal Winder immediately took possession of the sample and transported Defendant to the Cape Girardeau County Jail. After arriving at the jail, Corporal Winder again read Defendant the Missouri Implied Consent and asked that he submit to a breath test, but Defendant again refused.

The State filed charges against Defendant for driving while intoxicated. Defendant subsequently filed a motion to suppress the blood sample taken from Defendant because it was taken from Defendant without his consent and without a warrant.

In ruling on the motion, the trial court found this case did not involve exigent circumstances and, relying on *Schmerber v. California,* 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), it found the Fourth Amendment requires either a warrant or exigent circumstances to withdraw blood without consent. The trial court noted that the holding in *Schmerber,* where the results of the blood test were found to be admissible, was limited to the "special facts" of that case, which included a delay of two hours while the officer investigated the scene of an accident before delivering the defendant to the hospital and the court's specific

finding that there was no time to seek out a magistrate and secure a warrant. As a result, the trial court granted Defendant's motion to suppress evidence obtained by the warrantless blood withdrawal in this case where there was no accident and no substantial delay between the traffic stop and the blood draw and both a prosecutor and judge were readily available to issue a search warrant. The State appeals the suppression of the evidence.

In its sole point, the State argues the trial court erred in granting Defendant's motion to suppress the blood sample seized from Defendant without his consent and without a warrant after he was arrested for driving while intoxicated because the legislature eliminated the "none shall be given" language from Section 577.041, and that was the only provision under Missouri law barring police officers from obtaining nonconsensual and warrantless blood samples. We agree.

Our review of a trial court's ruling on a motion to suppress is limited to a determination of sufficiency of the evidence to sustain the trial court's finding. *State v. Kriley,* 976 S.W.2d 16, 19 (Mo.App. W.D.1998). At the hearing on the motion, the State has the burden of going forward with the evidence and the risk of non-persuasion to show by a preponderance of the evidence that a motion to suppress should be overruled. Section 542.296.6; *State v. Cook,* 273 S.W.3d 562, 567 (Mo.App. E.D.2008). The burden is placed upon the State because warrantless searches are presumptively unreasonable. *State v. Weddle,* 18 S.W.3d

389, 396 (Mo.App. E.D.2000). We will affirm the judgment of the trial court if there is sufficient evidence which would support the trial court's decision to sustain the motion to suppress on any ground alleged in the defendant's motion. *Kriley,* 976 S.W.2d at 19. We will only reverse the trial court's judgment if it is clearly erroneous. *Id.* The trial court's judgment is clearly erroneous if we are left with the definite and firm belief that a mistake has been made. *Id.*

In reviewing the trial court's decision to grant a motion to suppress, we view the evidence presented and all reasonable inferences drawn therefrom in the light most favorable to the trial court's order and disregard all evidence and inferences to the contrary. *State v. Abeln,* 136 S.W.3d 803, 808 (Mo.App. W.D.2004). We defer to the trial court's factual findings, and we review *de novo* whether the Fourth Amendment was violated as a matter of law under the facts found by the trial court. *Id.*

The Fourth Amendment to the United States Constitution guarantees that citizens will not be subject to unreasonable searches or seizures. U.S. Const. Amend. IV; *Simmons v. State,* 247 S.W.3d 86, 90 (Mo.App. S.D.2008). A search conducted without a warrant is presumptively unreasonable. *Id.* An exception to the general rule that a search requires a warrant exists when exigent circumstances are present. *Id.* Exigent circumstances exist if the time needed to obtain a warrant would endanger life, allow a suspect to escape, or risk the destruction of evidence. *Id.* The overriding function of the Fourth Amendment is to

protect personal privacy and dignity against unwarranted intrusion by the State. *Schmerber,* 384 U.S. at 767, 86 S.Ct. 1826.

Here, we are dealing with questions of law and, thus, our review is *de novo.* The State contends we are confronted with a two-prong inquiry here: (1) is a nonconsensual and warrantless blood draw under these circumstances a reasonable search and seizure under the Fourth Amendment; and (2) if so, does the Missouri implied consent law prohibit such nonconsensual and warrantless tests? We will begin with the first question.

The watershed case in this area of law is *Schmerber.* In *Schmerber,* the defendant was convicted of driving an automobile while under the influence of intoxicating liquor. *Schmerber,* 384 U.S. at 758, 86 S.Ct. 1826. The defendant had been arrested for driving while intoxicated at a hospital while receiving treatment for injuries suffered in an accident involving the car he had been driving. *Id.* At the direction of a police officer, a blood sample was taken from the defendant by a doctor at the hospital, and this sample showed he was intoxicated. *Id.* at 758-59, 86 S.Ct. 1826. The report of this analysis was admitted at trial, even though the defendant objected because the blood had been drawn despite his refusal. *Id.* In affirming the admission of the blood sample at trial, the Supreme Court noted the officer might have reasonably believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant threatened the destruction of evidence under

the circumstances because the percentage of alcohol in the blood diminishes as the body functions to eliminate it from the system. *Id.* at 770-71, 86 S.Ct. 1826. The Supreme Court noted "special facts" of this case included the fact that "time had to be taken to bring the accused to the hospital and to investigate the scene of an accident, [and] there was no time to seek out a magistrate and secure a warrant." *Id.* The Supreme Court found the defendant's rights under the Fourth Amendment had not been violated. *Id.* at 772, 86 S.Ct. 1826.

While the Court in *Schmerber* ostensibly relied on the "search incident to arrest" exception to the warrant requirement, subsequent courts have found it can be read as an application of the exigent circumstances exception to the warrant requirement. *U.S. v. Berry,* 866 F.2d 887, 891 (6th Cir.1989). The court in *Berry* noted because "evidence of intoxication begins to dissipate promptly, it is evident in this case that there were exigent circumstances indicating the need to take such action." *Id.* While *Berry* involved a warrantless blood draw at the hospital some time after a one car accident and the defendant was unconscious and unable to give consent, the court did not justify its ruling that the blood draw occurred under exigent circumstances with any "special facts." *Id.* The court merely stated "[t]he officer had ample cause to believe that defendant was under the influence of alcohol. The method of testing was safe and reasonable and administered by qualified personnel. It was done only

after there was a reasonable basis to effect this 'search and seizure.'" *Id.* at 890.

In *State v. Faust* 274 Wis.2d 183, 682 N.W.2d 371, 373 (2004), the Supreme Court of Wisconsin found "the rapid dissipation of alcohol in the bloodstream of an individual arrested for a drunk driving related offense constitutes an exigency that justifies the warrantless[,] nonconsensual test of that individual's blood." In that case, the court went even further by saying a warrantless, nonconsensual blood test was permissible because the presumptively valid chemical sample of the driver's breath that the police already had did not extinguish the exigent circumstances justifying the warrantless, nonconsensual blood draw. *Id.* The facts of that case involved a routine traffic stop, executed because the license plates were not registered to the vehicle. *Id.* at 374. Upon approaching the vehicle, the officer smelled a strong odor of intoxicants and observed the driver slurring his speech. *Id.* The officer then administered a field sobriety test that the driver failed. *Id.* The driver then volunteered to submit to a preliminary breath test, which indicated his blood alcohol concentration was above the legal limit. *Faust,* 682 N.W.2d at 374. The driver was then placed under arrest and taken to police headquarters where he performed another breath test, indicating his blood alcohol content was above the legal limit. *Id.* The officer then requested that the driver submit to a blood test, but the driver refused, at which point the officer transported him to a hospital and had a phlebotomist administer a blood

test without ever seeking a warrant. *Id.* The results of the blood test were admitted into evidence and showed the driver had a blood alcohol content above the legal limit. *Id.* The court in Faust also rejected an argument that Defendant puts forth in this case, that is, that *Schmerber* should be narrowly interpreted and its holding limited to cases with "special facts," finding instead that "exigent circumstances exist based solely on the fact that alcohol rapidly dissipates in the bloodstream." *Id.* at 377.

Missouri courts have recognized and adopted the holding in *Schmerber.* In *State v. Ikerman,* 698 S.W.2d 902, 904-05 (Mo.App. E.D.1985), the court noted *Schmerber* supports the general principle that the warrantless extraction of a blood sample without consent but incident to a lawful arrest is not an unconstitutional search and seizure and that the results of a blood test performed thereon are admissible in evidence. Thus, the implied consent statute authorizing a "search," that is, the extraction of blood for a blood alcohol test, without a warrant or actual consent does not offend the constitutional guarantees of due process or of freedom from unreasonable search and seizure of one who has first been arrested. *Id.*

Further, in *State v. Lerette,* 858 S.W.2d 816, 819 (Mo.App. W.D.1993), a trooper arrived at the scene of a one car accident and spoke with the passenger in the vehicle who smelled of intoxicants and who indicated that the defendant had been driving the car at the time of the accident. The trooper also found several beer cans strewn among the wreckage debris

including a partially full beer can in a Budweiser "coolie" holder next to the wrecked vehicle. *Id.* The accident involved a single vehicle driven by the defendant that for no apparent reason ran 30 feet off the roadway, rolling and flipping over and resulting in serious injuries to the defendant. *Id.* The court found that considering that the trooper was aware of all of this evidence after he arrived at the scene, he had ample cause to believe that the defendant was under the influence of alcohol while he was driving his car at the time of the accident. *Id.* The court found these facts establish that the trooper had probable cause to believe that incriminating evidence would be found if the defendant's blood were tested. *Id.* When the trooper arrived at the hospital, the trooper could not tell if the defendant was conscious or not, but he could not communicate with him and therefore, could not obtain his consent to a blood test. *Id.* The trooper directed hospital personnel to conduct a blood test anyway, and the results of the blood test were later suppressed by the trial court on the defendant's motion. *Id.* That order was reversed, and the court noted

> considering that the percentage of alcohol in the bloodstream diminishes with time and that the delay caused by having to obtain a warrant might result in the destruction of evidence, this court finds that there were exigent circumstances warranting [the trooper's] actions and, as such, it would have been unreasonable to require him to take the time to obtain a search warrant.

Id.

In *Faust*, *Berry*, and *Lerette*, where the courts followed *Schmerber* in applying the exigent circumstances exception to the warrant requirement, the courts did not require any "special facts" to justify the application of the exigent circumstances exception. Instead, they merely rely on the evanescence of blood alcohol concentrations as creating exigent circumstances such that no warrant is needed to conduct a search. We note both *Berry* and *Lerette* involved defendants who were unconscious or unable to give consent, but with respect to getting consent while evidence of alcohol is metabolized, an inability to give consent is effectively the same as a refusal of consent; the police are forced to either get a warrant or justify a blood test under exigent circumstances. We have no reason to require "special facts" in addition to the facts that the officer had ample cause to reasonably believe defendant was under the influence of alcohol and that Defendant's blood alcohol concentration would continue to decrease, thus destroying evidence, the longer the police waited to conduct a blood test.

We also note that while we are dealing with an intrusion into a person's body to obtain their blood, the Court in *Schmerber* noted extraction of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol. *Schmerber*, 384 U.S. at 771, 86 S.Ct. 1826. Further, writing over forty years ago, the Court noted "such tests are a commonplace in these days of periodic physical examination and experience with them teaches that the quantity of blood

extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain." *Id.*

Thus, we find Defendant's Fourth Amendment rights were not violated by the warrantless blood draw in this case.

We now turn to the question of whether the Missouri implied consent law prohibits such nonconsensual and warrantless tests. To further attempt to rid the highways of drunk drivers, our legislature enacted, like many other states, an "implied consent" statute. The theory behind this law is that the use of public streets and highways is a privilege and not a right, and that a motorist, by applying for and accepting an operator's license, "impliedly consents" to submission to a chemical analysis of his blood alcohol level when charged with driving while intoxicated. *Gooch v. Spradling,* 523 S.W.2d 861, 865 (Mo.App. W.D.1975). Section 577.020, Cum.Supp.2009, the implied consent statute, states in pertinent part:

> Any person who operates a motor vehicle upon the public highways of this state shall be deemed to have given consent to, subject to the provisions of sections 577.019 to 577.041, a chemical test or tests of the person's breath, blood, saliva or urine for the purpose of determining the alcohol or drug content of the person's blood pursuant to the following circumstances:
>
> (1) If the person is arrested for any offense arising out of acts which the arresting officer

had reasonable grounds to believe were committed while the person was driving a motor vehicle while in an intoxicated or drugged condition; . . .

3

The test shall be administered at the direction of the law enforcement officer whenever the person has been arrested or stopped for any reason.

Along with the implied consent statute, the legislature enacted a "refusal" statute, Section 577.041, RSMo Cum.Supp.2010 which currently provides, in relevant part:

If a person under arrest, or who has been stopped pursuant to subdivision (2) or (3) of subsection 1 of section 577.020, refuses upon the request of the officer to submit to any test allowed pursuant to section 577.020, then evidence of the refusal shall be admissible in a proceeding pursuant to section 565.024, 565.060, or 565.082, RSMo, or section 577.010 or 577.012.

Previously, this provision provided:

If a person under arrest, or who has been stopped pursuant to subdivision (2) or (3) of subsection 1 of section 577.020, refuses upon the request of the officer to submit to any test allowed pursuant to section 577.020, then *none shall be given and* evidence of the refusal shall be admissible in a proceeding pursuant to section 565.024, 565.060, or

> 565.082, RSMo, or section 577.010 or 577.012.

Section 577.041.1 Cum.Supp.2009. (emphasis added).

The previous version of Section 577.041 has been interpreted in *State v. Trumble,* 844 S.W.2d 22, 24 (Mo.App. W.D.1992), where the court noted the statute meant a motorist "has the present, real option either to consent to the test or refuse it." The court further found the statute provided that if one chooses not to comply with the arresting officer's request, by refusing to take a chemical test, then evidence of that refusal may be admissible in a proceeding against the motorist and further that the motorist's license may be subject to revocation. *Id.* The court also noted Section 577.041 provided the statutory requirements which must be satisfied in order to admit an arrestee's refusal into evidence, and, as a result, that section was more consistently read as providing a resource for the state in the prosecution of drunk driving cases rather than creating a "right" for an arrested motorist to refuse the test. *Id.*

However, no Missouri case has dealt directly with the import of the removal of the words "none shall be given" from Section 577.041. In *State v. Smith,* 134 S.W.3d 35, 36-37 (Mo.App. E.D.2003), after arresting a driver for driving while intoxicated, an officer obtained a search warrant to draw blood after the driver refused to submit to a chemical test. The court in that case interpreted the "none shall be given" language of Section 577.041 and concluded that the

provisions of Section 577.041 do not prohibit the admission of chemical test results obtained by warrant from a person arrested for driving while intoxicated who has refused a police officer's request to submit to a test. *Id.* at 38. The court noted the command that "none shall be given" was addressed only to the authority of law enforcement officers to proceed with a warrantless test under Chapter 577. *Id.* at 40.

Thus, the court in *Smith* found the "none shall be given" language prevented law enforcement officers from obtaining nonconsensual blood draws without a court-issued warrant. Subsequent to that holding, the legislature amended Section 577.041 to remove the words "none shall be given" from the statute. Thus, we are presented with the question of whether law enforcement officers are now permitted to obtain warrantless, nonconsensual blood draws when they have reasonable suspicion that a person is driving while intoxicated. We note the legislature is presumed to know the state of the law when it enacts a statute. *State v. Prince*, 311 S.W.3d 327, 334 (Mo.App. W.D.2010). Further, the legislature is presumed to intend what the statute says, and we give effect to the words based on their plain and ordinary meaning. *Id.* at 334-35. In light of our analysis above, we would conclude because of the recent revision of Section 577.041, removing the words "none shall be given," law enforcement officers are now permitted to order a warrantless blood draws when they have reasonable suspicion that a person is driving while intoxicated. However, no Missouri case has yet addressed the

import of the removal of the words "none shall be given" from Section 577.041.

We would find the trial court erred in granting Defendant's motion to suppress the blood sample seized from Defendant without his consent and without a warrant after he was arrested for driving while intoxicated. However, in the light of the fact that no Missouri case has yet addressed the import of the removal of the words "none shall be given" from Section 577.041, which we believe involves a significant departure from current case law as represented by the *Smith* case, and the general interest and importance of the issues involved, we transfer the case to the Missouri Supreme Court, pursuant to Supreme Court Rule 83.02.

KURT S. ODENWALD, P.J. and GARY P. KRAMER, Sp.J., concur.

IN THE CIRCUIT COURT OF CAPE GIRARDEAU COUNTY, MISSOURI DIVISION II

STATE OF MISSOURI,	)	
PLAINTIFF,	)	
	)	**CASE NO.**
VS.	)	**10CG-CR01849-01**
TYLER G. MCNEELY,	)	
DEFENDANT.	)	

ORDER AND JUDGMENT ON DEFENDANT'S MOTION TO SUPPRESS

The Defendant moved to suppress the results of a blood test taken without his consent and without a search warrant. Evidence on the motion was adduced on January 14, 2011 and the matter was taken under advisement pending receipt of briefs. Now, on the third day of March, 2011, the Court makes the following findings of fact, conclusions of law and judgment.

THE FACTS

Corporal Mark Winder was on patrol in Cape Girardeau County at 2:08 A.M. on Sunday, October 3, 2010. He was northbound on Kingshighway in the City of Cape Girardeau when his radar indicated that the Defendant's vehicle was speeding. Winder made a U-turn and stopped the Defendant, Tyler G. McNeely.

Winder observed that the Defendant showed signs of intoxication, which he confirmed with field sobriety tests. The Defendant declined to submit to a

test with a portable breath testing device. Winder arrested the Defendant and placed him in his patrol car at 2:18 A.M..

While en route to the Highway Patrol office at the Cape Girardeau County Sheriff's office in Jackson, Winder asked the Defendant if he would submit to a breath test at the sheriff's office. The Defendant said that he would not.

St. Francis Medical Center in Cape Girardeau was nearby and Corporal Winder drove there. Winder read the implied consent form to the Defendant. The Defendant said that he would not consent to a blood test for alcohol. Winder noted the time of the refusal as 2:33 A.M on the implied consent form. Winder directed the lab technician to draw the Defendant's blood and a sample was taken.

The Defendant was transported to the jail where he was again read the implied consent law and refused to take a breath test. Winder noted the second refusal at 2:55 A.M. No effort was made at any time to obtain a search warrant to procure the blood sample. Winder testified that he had been instructed that due to changes in the law, a warrant was not necessary to obtain the Defendant's blood sample.

Winder testified that he was sure that there was a prosecutor on call when he stopped the Defendant. He testified that the Cape Girardeau County Prosecutor has prepared an affidavit form for officers to use for a search warrant for blood of DWI suspects. He testified that he had obtained search warrants in

these circumstances less than ten times but he was never unable to obtain a warrant due to the unavailability of a prosecutor or a judge. Further, Winder testified that there was no reason to believe that he could not have obtained a search warrant due to the unavailability of a prosecutor or a judge. The Court received evidence of six cases in which search warrants for blood were obtained in Cape Girardeau County after regular business hours.

Sergeant Blaine Adams of the Missouri Highway Patrol testified that the Highway Patrol issued a communication instructing that warrantless searches for blood were only to be used in exigent circumstances and then only in driving while intoxicated cases that resulted in death or serious injury. Further, the patrol had instructed that warrantless searches were to be conducted only after expending all reasonable means to obtain a search warrant. The communication further recommended that zone sergeants (like Adams) meet with local prosecutors to discuss the procedure for when warrantless searches would be appropriate. This communication relied in part on the amendment (effective prior to the Defendant's arrest) of §577.041 RSMo. to delete the words "then none shall be given" from the implied consent law.

Sergeant Adams testified that he met with the Cape Girardeau County Prosecuting Attorney whose advice was the opposite of the Highway Patrol interoffice communication. According to Adams, the prosecutor instructed him that, "[I]f it's a standard DWI arrest or if it's a motor vehicle accident with no

injuries and they refuse, to go ahead and draw their blood. [The Prosecutor] said if it was a vehicle accident with injuries, he would prefer to get a search warrant . . . "

As to the exigency of the circumstances of a DWI arrest, Sergeant Adams was of the opinion that "any DWI arrest is exigent circumstances because you have evidence being destroyed with every passing minute."

Sergeant Adams agreed that the Highway Patrol communication recommended warrantless searches only in exigent circumstances where there was a manslaughter or vehicular assault with serious injuries. He also agreed that the Prosecuting Attorney's instructions were the opposite: that warrantless searches were appropriate for run of the mill DWI's but in a serious case the troopers should apply for a warrant. Sergeant Adams agreed that the Defendant's case was exactly a run of the mill case.

CONCLUSIONS OF LAW

In *Schmerber v. California, 384 U.S. 757 (1966)*, the United States Supreme Court affirmed the defendant's conviction for driving while intoxicated Schmerber had challenged the State's warrantless withdrawal of a blood sample following his arrest The court found that the blood draw did not violate Schmerber's Fourth Amendment rights because it was a search incident to his arrest. However, the court also found that this was an emergency situation

because there was a delay of about two hours for the officer to investigate the scene of the accident and for the defendant to be delivered to the hospital and that the evidence of alcohol in his blood was being diminished by normal bodily function. The court specifically found that "there was no time to seek out a magistrate and secure a warrant. Given these special facts, we conclude that the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner's arrest." *Schmerber at 771.*

The facts before this court are substantially different that the facts in *Schmerber.* There was no accident. There was no investigation at the scene of the stop other than the field sobriety tests, which took less than ten minutes. The defendant was not injured and did not require emergency medical treatment. This was not an emergency, it was a run of the mill driving while intoxicated case. As in all cases involving intoxication, the Defendant's blood alcohol was being metabolized by his liver. However, a prosecutor was readily available to apply for a search warrant and a judge was readily available to issue a warrant. *Schmerber* is not applicable because the "special facts" of that case, the facts which established the exigent circumstances, did not exist in this case to justify the warrantless search.

The next question is whether, as Corporal Winder believed, amendment of §577.041 RSMo. made it unnecessary to obtain a search warrant. The statute was amended in 2010, well after the Court of Appeals

issued its opinion in *State v. Smith, 134 S. W.3d 35 (Mo.App., E.D., 2004).*

In *Smith,* the defendant was arrested for driving while intoxicated, refused the breath test and was then subjected to a blood test pursuant to a search warrant. The trial court held that the implied consent law prohibited a blood test ordered by a search warrant if the defendant refused the breath test. The statute in effect at that time stated, "If a person under arrest . . . refuses . . . to submit to any test allowed pursuant to §577.020, then none shall be given . . . " The Court of Appeals held that §577.041 was addressed to the authority of law enforcement officers to administer an alcohol test after a refusal. The court held that the statute was not addressed to the authority of courts issuing search warrants. *Smith, at 40.*Therefore the trial court's order suppressing the evidence was reversed.

What, then, is the effect of the legislature removing the words, "then none shall be given" from §577.041? Clearly, it removes any doubt that a blood test may be compelled by search warrant after a refusal by a drunken driving suspect, and so, the statute is now consistent with the holding in *Smith.*

The amendment would also reverse part of the holding of *State v. Ikerman, 698 S.W.2d 902 (Mo. App., E.D., 1985).* In *Ikerman,* the police obtained a warrantless blood sample incident to a de facto arrest. The Court of Appeals held (among other things) that the test result was inadmissible because the

defendant refused the test and §577.041 required that where the warrantless test was refused, "none shall be given." Those four words have been deleted, therefore, the amendment allows police to obtain a warrantless blood draw without consent – but only under certain circumstances.

The amendment of §577.041 does not and cannot overcome the holding in *Schmerber v. California,* and the holdings of the Missouri courts, that the Fourth Amendment requires either a warrant or exigent circumstances to withdraw blood without consent. "[A]bsent consent or exigent circumstances, law enforcement officers must obtain a warrant to conduct a search and seizure that would invade a constitutionally – protected privacy interest." *Smith, at 37.*

Although the Highway Patrol and the Prosecuting Attorney maintain that a search warrant is not necessary to draw blood after a DWI arrest, both hedge their advice to law enforcement officers about the circumstances when a warrant is not necessary. They do not have full confidence in their positions, and justly so. None of the authorities submitted on this issue have held, on their own facts, that an officer may obtain a warrantless blood draw on an ordinary driving while intoxicated arrest when a warrant could be procured in a timely manner. None of the authorities submitted on this issue have held that the mere natural metabolization of alcohol from the defendant's blood – standing alone – amounts to exigent or special circumstances which justify a

warrantless blood draw under *Schmerber v. California.*

The motion is therefore sustained and the evidence obtained by the warrantless blood withdrawal is ordered suppressed.

3/03/2011	/s/
DATE	BENJAMIN F. LEWIS, CIRCUIT JUDGE

cc: Mr. Koester
Mr. Wilson

[SEAL]

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March 6, 2012

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In Re: State of Missouri, Appellant, vs.
Tyler G. McNeely, Respondent.
Missouri Supreme Court No. SC91850

Dear Mr. Koester:

Please be advised the Court issued the following order on this date in the above-entitled cause: "Appellant's motion for rehearing overruled." Draper, J., not participating.

Very truly yours,

BILL L. THOMPSON

/s/ Cynthia L. Turley
Cynthia L. Turley
Deputy Clerk, Court en Banc

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Mr. James B. Farnsworth	via e-filing system

OPPOSITION BRIEF

RECORD AND BRIEFS

11-1425

IN THE

Supreme Court of the United States

STATE OF MISSOURI,

Petitioner,

—v.—

TYLER G. MCNEELY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MISSOURI SUPREME COURT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Missouri Supreme Court correctly held that Petitioner violated the Fourth Amendment by subjecting Respondent to a nonconsensual and warrantless blood test after his arrest for driving while intoxicated when (a) the arresting officer testified that there were no exigent circumstances requiring a warrantless search, (b) both a prosecuting attorney and a judge were available to respond to any request for a search warrant, (c) Respondent's performance on multiple field sobriety tests was observed by the arresting officer and preserved on videotape, and (d) Respondent's refusal to consent to a blood test is admissible under Missouri law?

Respondent respectfully submits this brief in opposition to the petition for a writ of certiorari in this case.

COUNTER-STATEMENT OF THE CASE

At approximately 2:08 a.m. on October 3, 2010, Missouri State Highway Patrol officer Mark Winder pulled Respondent Tyler McNeely over for exceeding the speed limit by 11 miles per hour. (Tr. at 4:7-5:25, 12:17-13:2.)[1] Based on his observations during the traffic stop and Respondent's performance on four field sobriety tests, Corporal Winder suspected that Respondent was intoxicated. (*Id.* at 6:1-7:20, 8:4-7.) He asked Respondent to take a portable breath test, but Respondent declined. (*Id.* at 7:23-8:3.) Winder then placed Respondent under arrest. (*Id.* at 8:8-9.) When asked whether he would take a breath test at the police station, Respondent declined again, and Winder took him to a nearby medical laboratory to obtain a blood sample. (*Id.* at 8:10-9:4.) At the medical center, Winder asked whether Respondent would submit to a blood test.[2] (*Id.* at 8:24-10:5.) After Respondent declined the blood test, Winder directed a lab technician to take a blood sample over Respondent's objection at 2:33 a.m. (*Id.* at 10:6-13, 11:3-6.) Winder testified that he made no effort to

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[1] Citations to "Tr." refer to the transcript of the suppression hearing held on January 14, 2011.

[2] Although drawing an individual's blood and testing its contents are two distinct processes, for the purposes of this brief, Respondent adopts the convention of the lower courts and uses the terms "blood draw" and "blood test" interchangeably to refer to the process of taking an individual's blood.

obtain a search warrant. (*Id.* at 15:16-20.) He also testified that he chose not to seek a warrant because he had been told it was unnecessary rather than because of any exigency, that he assumed a prosecuting attorney and a judge would have been available had he chosen to seek a warrant, that he had never experienced a problem obtaining warrants in the past under similar circumstances, and that he had no reason to believe he could not have obtained a warrant in this case. (*Id.* at 14:1-4, 15:21-24, 16:23-17:10.) Respondent's blood sample indicated an ethyl alcohol level of 0.154%, in excess of the legal limit of 0.08%. (Record on Appeal, Legal File [hereinafter "Record"] at 26.) He was charged with driving while intoxicated in violation of Mo. Rev. Stat. § 577.010.

Respondent filed a pretrial motion in Cape Girardeau County Circuit Court to suppress the results of the blood test taken without his consent and without a search warrant. After a hearing at which Corporal Winder and Sergeant Blaine Adams of the Missouri State Highway patrol testified, the trial court held that the blood sample was drawn in violation of the Fourth Amendment and should be suppressed. (Pet. App. at 46a.) The trial court reasoned: "None of the authorities submitted on this issue have held, on their own facts, that an officer may obtain a warrantless blood draw on an ordinary driving while intoxicated arrest when a warrant could be procured in a timely manner." (*Id.* at 45a.) Petitioner filed an interlocutory appeal in the Missouri Court of Appeals. That court transferred the case to the Missouri Supreme Court but noted

that it would find the blood draw constitutional.[3] (*Id.* at 24a, 26a, 38a.)

The Missouri Supreme Court affirmed the trial court's suppression order. (*Id.* at 1a, 3a.) Noting that warrantless searches are per se unreasonable unless they fall within certain narrow exceptions, the Missouri Supreme Court weighed society's interest in preventing drunk driving against the defendant's Fourth Amendment interest in freedom from unreasonable searches and concluded that the fact that the blood alcohol level dissipates over time does not, by itself and without regard to other factors, qualify as an exigent circumstance under *Schmerber v. California*, 384 U.S. 757 (1966). (Pet. App. at 2a, 20a-22a.) Accordingly, it held that determining whether an officer could reasonably believe that exigent circumstances exist depends on the totality of the circumstances in any given case. (*Id.* at 19a-20a.) On the facts before it, the court found no reason to fear "delay that would threaten the destruction of evidence before a warrant could be obtained" where "there was no accident to investigate[,] . . . there was no need to arrange for the medical treatment of any occupants," and "there was no evidence . . . that the patrolman would have

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[3] In transferring the case to the state supreme court, the court of appeals explained that Respondent's suppression motion implicated not only the Fourth Amendment, but a recently amended state law governing nonconsensual blood draws in cases of suspected drunk driving. The court of appeals transferred the case in the interest of having the statute construed by the state's highest court. (Pet. App. at 38a.) Because the Missouri Supreme Court decided the issue on Fourth Amendment grounds, it did not reach the state law question. (*Id.* at 21a n.9)

been unable to obtain a warrant had he attempted to do so." (*Id.* at 3a.)

On March 6, 2012, the Missouri Supreme Court denied Petitioner's motion for rehearing. (*Id.* at 47a.)

REASONS FOR DENYING THE PETITION

I. THIS CASE IS AN INAPPROPRIATE VEHICLE FOR THE COURT TO DETERMINE WHEN EXIGENT CIRCUMSTANCES JUSTIFY A NONCONSENSUAL AND WARRANTLESS BLOOD DRAW.

This case is a poor candidate for a grant of certiorari for three reasons. First, the arresting officer acknowledged that his decision to order a nonconsensual blood test was based on the fact that he had been told warrants were unnecessary rather than on any concern that he could not obtain a warrant in timely fashion, making this a strange case in which to construe the exigency exception to the Fourth Amendment. Second, the record in this case is devoid of any testimony from a qualified expert on the complicated science of alcohol metabolism. An understanding of that science is critical to evaluating the categorical claim that any drunk driving arrest presents exigent circumstances that, in every instance, justify a warrantless blood test. Because the science is both complicated and contested, proper resolution of the constitutional issues in this case would be enhanced by a fully developed record. This case does not present one. Finally, it is by no means clear that resolution of the question presented will significantly affect the outcome of this case.

A. The Arresting Officer In This Case Did *Not* Act On The Basis Of Exigent Circumstances In Ordering A Technician To Draw Respondent's Blood Without Consent Or A Warrant.

Corporal Winder, the arresting officer, was asked during the suppression hearing in this case if his decision to forego a warrant was based on any concern that he could not obtain one in timely fashion. He said no.[4] When asked why he did not

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[4] Q: Was there any particular exigent circumstance as you understand that from your training or emergency circumstances that dictated the need to immediately get blood from Mr. McNeely?

A: Exigent, no.

. . . .

Q: Okay. In your time as a highway patrolman, have you obtained search warrants to obtain blood from people that have been arrested for driving while intoxicated?

A: Yes.

. . . .

Q: On any of the times in your training or in your experience when you have wanted to get a search warrant, have you been unable to because of the unavailability of a prosecuting attorney?

A: No.

Q: Have you ever been unable to because of the unavailability of a judge?

A: No.

Q: On this particular night, did you have any reason to believe that you couldn't have gotten a search warrant

seek a warrant, Winder testified that his decision was based on an article he had read by a prosecutor stating that it was unnecessary to obtain a warrant before drawing blood in cases of suspected drunk driving. (Tr. at 14:1-20.)

In proceeding without a warrant, Winder disregarded a directive from a superior that warrantless blood draws in suspected drunk driving cases should be conducted "only . . . in exigent circumstances and then only on manslaughter/vehicular assault cases with serious physical or disabling injuries, after expending all reasonable means to obtain a search warrant." (Record at 35.) He also ignored his personal experience of over 17 years as a patrolman. (Tr. at 4:12-14.) Winder had never had trouble in the past obtaining search warrants for blood samples from people he had arrested for driving while intoxicated and had no reason to believe this occasion would be any different. (*Id.* at 16:17-17:10.) In assessing exigency, "the facts known to the police are what count," *United States v. Banks*, 540 U.S. 31, 39 (2003), and none of the facts testified to by Corporal Winder suggests he faced an emergency situation. A case in which the searching officer testified that he did not face exigent circumstances is a poor vehicle for deciding the scope of the exigent circumstances exception.

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because of the unavailability of a prosecutor or the unavailability of a judge?

A: No.

(Tr. at 14:24-15:3, 15:25-16-3, 16:23-17:10.)

B. To The Extent That Resolution Of The Exigency Question Turns On The Science Of Alcohol Dissipation, The Record In This Case Is Insufficient For A Full And Fair Evaluation Of The Issue.

A finding of exigency requires a determination that evidence of guilt will be destroyed if time is taken to obtain a warrant. *Mincey v. Arizona*, 437 U.S. 385, 394 (1978) (finding no exigent circumstances because "[t]here was no indication that evidence would be lost, destroyed, or removed during the time required to obtain a search warrant"). As it pertains to blood alcohol content ("BAC"), such a determination depends on physiological data about the process of alcohol metabolism, data that is the subject of ongoing scientific study. *See, e.g.*, Douglas Posey & Ashraf Mozayani, The Estimation of Blood Alcohol Concentration: Widmark Revisited, 3 Forensic Sci., Med. & Pathology 33 (2007). Absent robust scientific inquiry into the complex pharmacokinetic processes governing the gradual rise and eventual fall of BAC—an inquiry which the sparse record on appeal does not permit—the Court is poorly positioned to make two critical determinations: whether any blood test taken after the time of operation is probative of BAC at the earlier time when a defendant was driving, and the rapidity with which evidence of BAC is in danger of disappearing. When resolution of a critical issue depends on a full and complete record, the Court should await, before decision, the proper development of such a record. That is especially so in this case because this Court has recognized in *Schmerber* that a nonconsensual blood test raises serious Fourth Amendment issues involving

fundamental questions of "human dignity and privacy," *Schmerber*, 384 U.S. at 770.

The oversimplified portrait of alcohol metabolism painted by the minimal record glosses over important areas of complexity. BAC does not simply decrease over time; instead, alcohol is metabolized in two distinct, gradual phases: absorption and elimination. A.W. Jones, Biochemical and Physiological Research on the Disposition and Fate of Ethanol in the Body, *in* Garriott's Medicolegal Aspects of Alcohol 47, 54 (James C. Garriott ed., 5th ed. 2008). In the first phase, BAC rises as alcohol is distributed from the stomach throughout the body. *Id.* at 55-68. This absorption process does not occur at a constant rate and depends on dozens of variables; it may take anywhere from 30 minutes to two hours for BAC to reach its peak. *Id.* In the second phase, BAC drops as the alcohol is gradually converted to carbon dioxide and water. *Id.* This two-step progression is critical for understanding and evaluating the evidentiary value of BAC. For example, a blood test taken 30 minutes after a defendant has ceased operating a vehicle, revealing a .10% BAC, might mean that the defendant in fact had no measurable quantity of alcohol in his bloodstream at the time he was driving if he was still absorbing alcohol during those 30 minutes. On the other hand, if the alcohol was being eliminated during the 30-minute interval, it might indicate that the BAC at the time of operation was significantly higher than .10%. Though unlikely, it might even indicate that BAC at the time of operation was, in fact, exactly .10% if the defendant happened to finish absorption and begin elimination

during the elapsed time between operation and the blood test.

Therefore, an officer who obtains a BAC reading of .08% or higher at any time does not have the smoking-gun evidence necessary to convict a defendant. Since the amount of alcohol in a defendant's bloodstream is constantly changing, the result of a blood test taken some time after a defendant has stopped driving is not direct evidence of the defendant's BAC at the time of operation.[5] To estimate BAC at the time of operation based on a later blood test, a technique known as retrograde extrapolation is typically used. *See* Jones, *supra*, at 103. When based on a single blood sample, retrograde extrapolation generally calculates an earlier BAC by simply multiplying the time elapsed between operation and the blood draw by the average alcohol elimination rate. *See* Charles L. Winek & Kathy L. Murphy, The Rate and Kinetic Order of Ethanol Elimination, 25 Forensic Sci. Int'l 159, 159 (1984).

This record does not provide nearly enough information to properly evaluate the reliability of retrograde extrapolation and, in turn, the degree to which a blood test taken after a defendant stops driving can yield probative evidence.[6] To the extent

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[5] In Missouri, a reading of .08% BAC or more is prima facie evidence of intoxication "*at the time the specimen was taken*," not at the time the defendant was driving. Mo. Ann. Stat. § 306.117 (emphasis added).

[6] Retrograde extrapolation may yield questionable results for several reasons. First, it ordinarily assumes that the defendant had already begun eliminating alcohol while operating the vehicle. *See, e.g.*, Jones, *supra*, at 103-04. Because alcohol

that the state intends to rely on retrograde extrapolation, however, it may do so using a blood sample taken at any time before alcohol is *completely* eliminated from the defendant's system and BAC is zero. On the basis of the generalizations presented in the record, a police officer has a *minimum* of four hours to obtain a warrant and perform a blood test.[7] Nothing in the record suggests that a blood test taken further from the time of the arrest renders retrograde extrapolation less accurate.[8]

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absorption is less regular, and as a result less predictable than alcohol elimination, it is often difficult to determine when a defendant completed absorption. *Id.* Moreover, even if an expert knew that a defendant was still absorbing alcohol at the time he or she was driving, the relationship between time and BAC during absorption is neither constant nor consistent, making earlier BAC difficult to estimate. *Id.* Second, retrograde extrapolation is generally performed using an average elimination rate, rather than the elimination rate of the particular defendant, which is difficult to calculate. Thus, experts will over- or underestimate the BAC of a defendant with an above- or below-average alcohol elimination rate. *See, e.g.*, Winek & Murphy. *supra*, at 165.

[7] A defendant whose BAC is barely above the .08% legal limit at the time he is operating the vehicle, who has already begun eliminating alcohol, and who eliminates at .02% per hour—the maximum rate contemplated in the record—will not have a BAC of 0% until four hours after he is stopped. (*See* Tr. at 21:17-22:4.)

[8] Moreover, the record contains no information about the reliability of less intrusive means of testing BAC currently available to officers or those in development, such as passive breath tests, urinalysis, or tests that rely on saliva or hair samples—techniques that may lessen the need for blood testing. *See, e.g.*, National Highway Traffic Safety Administration, Alcohol and Highway Safety: A Review of the State of Knowledge § 3.2 (2006); Yale A. Caplan & Bruce A. Goldberger,

Petitioner presents a record that is insufficient to answer the question presented. Petitioner claims that there is "no dispute" about the probative nature of the blood test in question or about the destruction of evidence. (Pet. App. at 36-37.) Though the "level of alcohol in the bloodstream of a drunk driver" is certainly "highly probative evidence" (*Id.* at 36), the level of alcohol in the bloodstream of a defendant after he stops driving may not be. Further, while that level of alcohol is "subject to destruction by the body's natural, physiological processes" (*Id.* at 37), dissipation may not impact the probative nature of the evidence until alcohol is completely metabolized—an event whose timeframe is not discussed in this record.

In short, Petitioner seeks to justify a warrantless blood draw on the basis of imminent destruction of probative evidence, yet the record before the Court does not allow it to evaluate either whether the blood test in question is probative evidence or whether the BAC is in danger of imminent destruction. Until such a record is established, the Court should decline review of the issues presented.

C. Resolution Of The Question Presented Will At Best Have An Uncertain Impact On The Outcome Of This Case.

This is plainly not a situation in which the state's case collapses if the results of the nonconsensual and warrantless blood test are

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Blood, Urine, and Other Fluid and Tissue Specimens for Alcohol Analyses, *in* Garriott's Medicolegal Aspects of Alcohol, *supra*, at 207-08; Jones, *supra*, at 123-26.

suppressed. Corporal Winder has been a patrolman with the Missouri State Highway Patrol for over 17 years. (Tr. at 4:12-14.) At the suppression hearing, he testified that Respondent gave the appearance of intoxication, smelled of alcohol and failed various field sobriety tests, having been unable to stand on one leg, walk in a straight line or recite the alphabet. (*Id.* at 6:1-7:22.) Respondent's efforts to perform these tests are preserved on a video recording. (Record, Ex. A.) Winder further testified that he administered a horizontal gaze nystagmus test, and Respondent exhibited six out of six possible clues of impairment.[9] (Tr. at 6:24-7:8.) Blaine Adams, a sergeant with the Missouri State Highway Patrol with 23 years' experience, testified that "studies show that if [a driver exhibits] four or more clues, there's a 91 percent probability that they will have a blood alcohol content of .08 or greater." (*Id.* at 19:15-21, 20:23-21:7.)

In addition, Mo. Ann. Stat. § 577.041 provides that if a person under arrest for suspicion of drunk driving "refuses upon the request of the officer to submit to [a blood or breath test], then evidence of the refusal shall be admissible" in a criminal proceeding for driving while intoxicated.

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[9] Officers administering the nystagmus test are trained to observe tiny, uncontrollable eye contractions that indicate intoxication. Joseph E. Manno et al., Experimental Basis of Alcohol-Induced Psychomotor Performance Impairment, in Garriott's Medicolegal Aspects of Alcohol, *supra*, at 347, 357. Because depressant drugs such as alcohol affect motor control of the eye, intoxicated individuals are unable to smoothly move their eyes from left to right while focusing on an object. *Id.*

None of this necessarily means that the prosecution will secure a conviction if the case is allowed to proceed to trial. It does mean, however, that this is a very different case from one in which the only incriminating evidence is the subject of a suppression motion and the case is effectively over if the suppression motion is granted. Under these circumstances, discretion counsels against the grant of certiorari. "'[I]t is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.'" *United States v. Resendiz-Ponce*, 549 U.S. 102, 104 (2007) (quoting *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)) (internal quotation marks omitted).

II. MOST JURISDICTIONS RECOGNIZE THAT FACTORS OTHER THAN ALCOHOL DISSIPATION ARE RELEVANT IN DETERMINING WHETHER EXIGENCY JUSTIFIES A WARRANTLESS BLOOD DRAW.

The nonconsensual, warrantless blood draw in this case would have been prohibited by statute in at least 27 states.[10] Where state law would not prohibit

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[10] In at least 27 states, statutes governing chemical tests of those arrested on suspicion of drunk driving prohibit nonconsensual blood draws, *see* Ala. Code § 32-5-192(c)); Mass. Gen. Laws ch. 90 § 24(1)(e), (f); Or. Rev. Stat. § 813.100(2), nonconsensual warrantless blood draws, *see* Ariz. Rev. Stat. Ann. § 28-1321(D)(1); Ga. Code Ann. § 40-5-67.1(d), (d.1); Ky. Rev. Stat. Ann. § 189A.105(2); Mich. Comp. Laws Ann. § 257.625d(1); Mont. Code Ann. § 61-8-402(4), (5); N.M. Stat. Ann. § 66-8-111(A); N.Y. Veh. & Traf. Law §§ 1194(2)(a)(4)(b)(1), 1194(3); N.C. Gen. Stat. Ann. § 20-16.2 (c); R.I. Gen. Laws §§ 31-27-2.1(b), 31-27-2.9(a) (allowing for nonconsensual searches

a warrantless search, the prevailing judicial rule—reflected in decisions by state courts of last resort and federal courts of appeals—is that claims of exigency must be examined in light of all factors that would inform a reasonable officer's decision not to obtain a warrant.

In addition to the Missouri Supreme Court, the courts of last resort in at least five states have unequivocally rejected "a *per se* rule that the natural dissipation of blood-alcohol is alone sufficient to constitute exigent circumstances" (Pet. App. at 14a). *See People v. Wehmas*, 246 P.3d 642, 650-51 (Colo. 2010) ("[A]lthough BAC certainly dissipates gradually with time, this dissipation, as a general matter, does not create the urgency and imminence of loss contemplated by our governing precedent. . . . The prosecution has failed to demonstrate that the officers had insufficient time to get a warrant under

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pursuant to warrant only in cases of death or serious injury); 23 Vt. Stat. Ann. tit. 23 § 1202(b), (f) (allowing for nonconsensual searches pursuant to warrant only in cases of death or serious injury); W. Va. Code § 17C-5-7 (as construed in *State v. Stone*, ---S.E.2d ---, 2012 WL 2369483, at *12 (W. Va. June 21, 2012)), or nonconsensual warrantless blood draws except in cases of death or serious injury, *see* Alaska Stat. Ann. §§ 28.35.032(a), 28.35.035(a); Conn. Gen. Stats. Ann. §§ 14-227b(b), 14-227c(b); Fla. Stat. Ann. § 316.1933(1)(a); Haw. Rev. Stat. §§ 291E-15, 291E-21(a); Iowa Code Ann. §§ 321J.9(1), 321J.10(1), 321J.10A(1); Kan. Stat. Ann. § 8-1001(b), (d); Md. Code Ann., Transp. § 16-205.1(b)(1), (c)(1); N.D. Cent. Code Ann. §§ 39-20-01.1, 39-20-04(1); N.H. Rev. Stat. Ann. §§ 265-A:14(I), 265-A:16; Okla. Stat. Ann. tit. 47, § 753; S.C. Code Ann. §§ 56-5-2946, 56-5-2950(B) (as construed in *State v. Mullins*, 489 S.E.2d 923, 924 (1997)); Wash. Rev. Code Ann. § 46.20.308(3), (5); Wyo. Stat. Ann. § 31-6-102(d).

the circumstances." (citation omitted));[11] *State v. Johnson*, 744 N.W.2d 340, 344 (Iowa 2008) ("the mere phenomenon of alcohol dissipation" from the bloodstream cannot by itself establish exigency); *State v. Rodriguez*, 156 P.3d 771, 776 (Utah 2007) ("*Schmerber* does not stand for the proposition that the loss of evidence of a person's blood-alcohol level through the dissipation of alcohol from the body was a sufficient exigency to justify a warrantless blood draw."); *Bristol v. Commonwealth*, 636 S.E.2d 460, 464 (Va. 2006) ("The mere fact that a defendant's blood alcohol content might dissipate is insufficient, by itself, to support application of the 'exigent circumstances' exception."); *State v. Shepherd*, 840 P.2d 644, 646 (Okla. Crim. App. 1992) (officer's "belie[f] that under the circumstances, any delay necessary to secure a warrant may result in the loss of evidence . . . must be [evaluated] on a case by case basis").

Rather than adopt the categorical rule that Petitioner has proposed, additional courts have considered, among other factors, how quickly a warrant can be obtained, whether the officer has been detained at an accident scene or has otherwise

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[11] *Wehmas* involved a challenge to a warrantless entry into an apartment to arrest a suspected drunk driver. In cases more factually similar to this one, the Colorado Supreme Court has consistently considered factors beyond the gradual dissipation of blood alcohol content. *See, e.g., People v. Schall*, 59 P.3d 848, 853 (Colo. 2002) ("Because alcohol dissipates quickly in the blood, exigent circumstances exist when time has elapsed while the driver is transported to a hospital and the investigating officer is detained at the accident scene." (internal quotation marks omitted)); *accord People v. MacCallum*, 925 P.2d 758, 764 (Colo. 1996)).

been unable to seek a warrant, the state's interest in obtaining the evidence, and the significance of the privacy infringement. For example, in *Deeds v. State*, 27 So.3d 1135, 1145 (Miss. 2009), the Supreme Court of Mississippi based its finding of exigent circumstances on not only the dissipation of alcohol, "but also the fact that the officers were involved in the investigation of a major vehicle accident involving serious injuries to multiple people, requiring their transportation to nearby hospitals, as well as the time that would have been required to obtain a warrant before traveling to the hospital to obtain the samples." The Supreme Court of South Dakota adopted a similar approach in *State v. Engesser*, 661 N.W.2d 739, 748 (S.D. 2003) ("Three hours had already elapsed since the accident when Engesser's blood was drawn. The more time that went by the less likely the evidence could be obtained at all. Evidence of Engesser's intoxication would have been 'forever lost' without the blood draw."). *See also State v. Lamont*, 631 N.W.2d 603, 614-15 (S.D. 2001) (finding exigency to enter hotel room of a suspected drunk driver where officers with strong probable cause to believe that a "serious offense" had occurred under "grave circumstances" were engaged in field investigation that took over three hours to locate defendant, and limiting holding to the circumstances of the case as Fourth Amendment analysis should "avoid bright-line rules").

Likewise, in *People v. Thompson*, 135 P.3d 3, 13 (Cal. 2006), the California Supreme Court considered "all of the circumstances" before concluding that exigency justified warrantless entry into the home of a suspected drunk driver where defendant had demonstrated his intent to escape and

thus where the evidence of his crime would have dissipated before the police could locate him.[12] Other jurisdictions employing a totality analysis include North Dakota, *see State v. Kimball*, 361 N.W.2d 601, 604-05 (N.D. 1985) (given the metabolism of alcohol in the bloodstream, "the unknown period of time which had elapsed since Kimball's accident presented Officer Hummel with an emergency in which the delay necessary to obtain a warrant threatened the destruction of evidence"), and New Hampshire, *see State v. Wong*, 486 A.2d 262, 274-75 (N.H. 1984) (evaluating exigency with reference to the time officers spent at the accident scene as well as the amount of time it would take to obtain a warrant); *see also State v. Stern*, 846 A.2d 64, 69 (N.H. 2004) ("Whether exigent circumstances exist is judged by the totality of the circumstances" and "is largely a question of fact for the trial court.").

The federal courts of appeals have similarly looked beyond the mere fact of gradual dissipation to determine whether warrantless blood draws can be justified by claims of exigency. Contrary to Petitioner's oversimplified summary of *United States v. Eagle*, 498 F.3d 885 (8th Cir. 2007), the fact that "'the body functions to eliminate [alcohol] from the system'" (Pet. App. at 24 n.9 (quoting *Eagle*, 498 F.3d at 893) (alteration in original)) is but one element of

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[12] Petitioner lists *People v. Thompson* among cases "holding that dissipation of alcohol in the bloodstream creates exigent circumstances" (Pet. App. at 22 n.8), but the *Thompson* court was careful to point out that in finding a warrantless search justified by the totality of circumstances then before it, it "d[id] not hold . . . that the police may enter a home without a warrant to effect an arrest of a DUI suspect in *every* case," *Thompson*, 135 P.3d at 13.

the Eighth Circuit's reasoning in assessing exigency claims. In *Eagle*, the court held that the district court's exigency finding was not plain error, noting that "[n]early two and a half hours passed between the accident and the time when the blood was drawn," and "[r]equiring the officer to get a warrant for the evidence would have resulted in a greater delay, allowing for the further dissipation of the alcohol in Mr. Eagle's blood and creating a risk that Mr. Eagle would be unavailable for having his blood drawn upon the officer's return." *Eagle*, 498 F.3d at 892.[13]

The Ninth and Tenth Circuits have also looked beyond mere dissipation to determine whether exigency justifies warrantless blood draws in drunk-driving cases. *See Marshall v. Columbia Lea Regional Hosp.*, 474 F.3d 733, 742 (10th Cir. 2007) ("When a suspect has taken an alternative test of equal evidentiary value, the risk that evidence will be lost disappears and the exigent circumstances that excused the police from obtaining a warrant likewise disappears, rendering a warrantless nonconsensual blood test in such circumstances unconstitutional." (internal quotation marks

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[13] Petitioner also cites *United States v. Prouse*, 945 F.2d 1017 (8th Cir. 1991). (Pet. App. at 24 n.9.) In *Prouse*, the defendants did not challenge the warrantless nature of the search, but argued that the results of two sets of blood tests should be suppressed because "the first blood tests were the fruit of an unlawful arrest; . . . there was not probable cause to support the first blood tests; and . . . the results of the second blood tests were privileged." *Prouse*, 945 F.2d at 1022-23. The uncontested finding of exigency was supported by unchallenged evidence that law enforcement officers did not apprehend the defendants until 10 or 11 hours after the defendants had stopped drinking.

omitted)); *Nelson v. City of Irvine*, 143 F.3d 119(1205 (9th Cir. 1998) ("Whenever a DUI arreste consents to a breath or urine test, and such tests ar available, the administration of either the breath o urine test would preserve the evidence and end th exigency."); *accord Hammer v. Gross*, 932 F.2d 84: 851-52 (9th Cir. 1991) (en banc) (Kozinski, J. concurring).

Although Petitioner includes the Fourtl Circuit among courts whose decisions categoricall; turn on the mere fact of dissipation (Pet. App. at 25 26), in *United States v. Reid*, 929 F.2d 990, 993 (4tl Cir. 1991), the Fourth Circuit did not ignore evidenc bearing on factors other than the metabolism o alcohol. Rather, it upheld the district court's findin of exigency only after it had carefully evaluated th defendant's arguments that the availability o telephonic warrants eliminated any exigency an determined that the "intricate requirements" of th telephonic warrant process were not fast enough t alleviate the risk of lost evidence. *Reid*, 929 F.2d a 993.[14]

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[14] Petitioner also identifies the Sixth Circuit as a cour employing a single-factor exigency test that turns solely on th fact of dissipation. (Pet. App. at 23-24.) As in *Prouse*, exigenc was not challenged in *United States v. Berry*, 866 F.2d 887 (6tl Cir. 1989), which held that an arrest is not a necessar prerequisite to a warrantless blood draw. The question o exigency was similarly not challenged by defendants an therefore not squarely before courts in other cases claimed b Petitioner to hold that alcohol metabolism creates a per s exigency (*see* Pet. App. at 22 n.8). *See State v. Cocio*, 709 P.2 1336, 1345 (Ariz. 1985) (construing a state statute limitin seizure of blood to that "drawn by medical personnel for an medical reason," and not drawn at officer's direction); *State v Baker*, 502 A.2d 489 (Me. 1985) (defendants challenge

In the majority of these cases, the courts found that dissipation of alcohol created an exigency justifying the warrantless search at issue, but only when considered alongside other relevant factors. Like the Missouri Supreme Court, they followed an approach that would have allowed for a showing in a particular case that no true emergency existed. Even the Oregon Supreme Court, which according to petitioner has categorically ruled that the evanescent nature of blood alcohol content alone creates an exigency (Pet. App. at 18-20), has acknowledged that in the rare case where a warrant reliably can be obtained before blood alcohol content is lost, "a warrantless blood draw [will] be unconstitutional," *State v. Machuca*, 227 P.3d 729, 736 (Or. 2010).

Similarly, the Supreme Court of Wisconsin, which in *State v. Bohling* asserted a per se rule that exigency exists in every drunk-driving case "based solely on the fact that alcohol rapidly dissipates in the bloodstream," 494 N.W.2d 399, 402 (Wis. 1993), reaffirmed that assertion in *State v. Faust*, but like the Oregon Supreme Court, did so with a caveat,

---

warrantless blood draw on basis that it did not follow arrest, was not supported by probable cause and was not done in a reasonable manner); *State v. Woolery*, 775 P.2d 1210, 1212 (Idaho 1989) (affirming denial of motion to suppress where defendant argued the sample was taken without probable cause or consent in violation of state statute); *State v. Entrekin*, 47 P.3d 336, 348 (Haw. 2002) ("In the present matter, Entrekin does not dispute Officer Nakooka had probable cause to believe that Entrekin was DUI or that exigent circumstances were present when he requested that a sample of Entrekin's blood be obtained."). None of these cases holds that courts may ignore evidence tending to show the absence of a true emergency whenever a state points out that alcohol eventually dissipates from the bloodstream.

emphasizing that its holding was limited to "*the fact of this case*," 682 N.W.2d 371, 383 n.16 (Wis. 2004) "[W]e reiterate that the reasonableness of a warrantless nonconsensual test [for blood alcoho content] . . . will depend upon the totality of the circumstances of each individual case." *Faust*, 68 N.W.2d at 383, n.16. The court suggested, fo instance, that "[t]here may well be circumstance where the police have obtained sufficient evidence o the defendant's level of intoxication that a furthe test would be unreasonable under the circumstance presented." *Id.* at 383. Ultimately, therefore, th Wisconsin Supreme Court, like virtually all othe state courts of last resort, has acknowledged that an purportedly per se test for exigency must leave roo for a case in which the record fails to establish a arguable emergency necessitating a warrantles blood draw.

The only exceptions are the Minnesota an Ohio Supreme Courts. In rejecting facial challenge to state statutes authorizing criminal penalties fo refusing to submit to blood tests upon probabl cause, both courts held that in every case, "exigen circumstances justify the warrantless seizure of a blood sample in a DUI case." *State v. Hoover*, 91 N.E.2d 1056, 1061 (Ohio 2009); *accord State v Netland*, 762 N.W.2d 202, 214 (Minn. 2009) ("W hold that the criminal test-refusal statute does no violate the prohibition against unreasonable searche and seizures found in the federal and stat constitutions because under the exigency exception no warrant is necessary to secure a blood-alcohol tes where there is probable cause to suspect a crime i which chemical impairment is an element of th offense."); *see also State v. Shriner*, 751 N.W.2d 53

(Minn. 2009). These cases are outliers. Notably, they were decided on records apparently containing no evidence that, despite eventual dissipation, a warrant could be obtained or the search could be foregone without risking valuable evidence.

On the other hand, in every case cited above in which the defendant presented evidence specifically undermining the state's exigency claim, the relevant court carefully considered the significance of that evidence. In many such cases, the court concluded that based on a totality of the circumstances the officer conducting the search reasonably believed he faced a true emergency, *see, e.g.*, *Reid*, 929 F.2d 990; *Faust*, 682 N.W.2d 371, while in others, the court concluded that the officer failed to establish he reasonably believed the search was justified, *see, e.g.*, *Wehmas*, 246 P.3d 642; *Nelson*, 143 F.3d 1196. These varying conclusions are based on different factual determinations applying a totality of the circumstances test, not differences in courts' willingness to consider all relevant facts. They do not reflect, as Petitioner suggests, either a profound or growing split among jurisdictions.

III. THE MISSOURI SUPREME COURT CORRECTLY CONSTRUED *SCHMERBER V. CALIFORNIA* TO REQUIRE MORE THAN THE MERE DISSIPATION OF ALCOHOL FROM THE BODY TO JUSTIFY A WARRANTLESS BLOOD DRAW UNDER THE LIMITED EXIGENT CIRCUMSTANCES EXCEPTION TO THE WARRANT REQUIREMENT OF THE FOURTH AMENDMENT.

A. Exigent Circumstances Are Traditionall Assessed Based On The Totality Of Th Circumstances.

Exigent circumstances justify a warrantles nonconsensual search only if "police action literal must be 'now or never' to preserve the evidence of th crime." *Roaden v. Kentucky*, 413 U.S. 496, 5((1973). In evaluating the state's claim of exigency i this case, the Missouri Supreme Court followed th clear precedent of this Court in rejecting the "overla of a categorical scheme on the gener reasonableness analysis [that] threatens to disto the 'totality of the circumstances' principle, b replacing a stress on revealing facts with resort t pigeonholes," *Banks*, 540 U.S. at 42 (quoting *Unite States v. Arvizu*, 534 U.S. 266, 274 (2002)). It instea considered a variety of factors that might contribut to an officer's determination that failing to a without delay would result in the irretrievable loss valuable evidence.

Petitioner argues that the Missouri Suprem Court erred when it refused to abandon a case specific factual inquiry in favor of a single-facto categorical approach to determining exigency, bu nothing in this Court's precedents recommends suc an approach. In fact, much counsels against it. Ove and over again, the Court has explained that "'[t]h test of reasonableness under the Fourth Amendmen is not capable of precise definition or mechanica application,' however, its proper application require careful attention to the facts and circumstances c each particular case," *Graham v. Connor*, 490 U.S 386, 396 (1989) (quoting *Bell v. Wolfish*, 441 U.S 520, 559 (1979)) (alteration in original); *accor*

Winston v. Lee, 470 U.S. 753, 760 (1985) ("The reasonableness of [a search] depends on a case-by-case approach . . . [and] the question whether the community's need for evidence outweighs the substantial privacy interests at stake is a delicate one admitting of few categorical answers.").

A fact-sensitive approach is no less appropriate in the context of exceptions to the warrant requirement. In *Richards v. Wisconsin*, 520 U.S. 385 (1997), this Court rejected the Wisconsin Supreme Court's per se exception to the knock-and-announce rule in cases involving drug investigations, characterizing the per se rule as "contain[ing] considerable overgeneralization." The Court acknowledged that "drug investigation frequently does pose special risks to officer safety and the preservation of evidence," but the Court also recognized that

> not every drug investigation will pose these risks to a substantial degree. . . . [T]he fact that felony drug investigations may frequently present circumstances warranting a no-knock entry cannot remove from the neutral scrutiny of a reviewing court the reasonableness of the police decision not to knock and announce in a particular case. Instead, in each case, it is the duty of a court confronted with the question to determine whether the facts and circumstances of the particular entry justified dispensing with the knock-and-announce requirement.

Id. at 393-94.

Similarly, while every drunk-driv
investigation will involve the eventual dissipatio
a suspect's blood alcohol content, not every case
involve a risk of losing evidence of intoxication be
the police can obtain a warrant authorizing
search. To establish a "blanket rule" that blood
be drawn without a warrant regardless
consideration of the facts and circumstances
particular case—including whether the po
reasonably believed that they lacked enough tim
procure a warrant before the evidence disappea
and whether the police had available and utili
other means for determining sobriety—wo
"untether the rule from the justifications underly
the . . . exception," *Arizona v. Gant*, 556 U.S. 332,
(2009). and "impermissibly insulate[]" cases in wh
no exigency exists from judicial review, *Richa*
520 U.S. at 393.

B. The Missouri Supreme Court Corre Applied *Schmerber* To The Facts Of T Case.

Against this background, the Miss
Supreme Court properly read this Court's decisio
Schmerber v. California, 384 U.S. 757 (1966), as
application of, rather than a rare exception to,
Court's usual practice of weighing all of the f
known to the officers to determine whether "
exigencies of the situation' make the needs of
enforcement so compelling that [a] warrant
search is objectively reasonable under the Fo
Amendment," *Mincey*, 437 U.S. at 394. *See Wins*
470 U.S. at 760 ("[T]he [*Schmerber*] Court recogn
that Fourth Amendment analysis . . . require
discerning inquiry into the facts and circumsta

to determine whether the intrusion was justifiable."). *Schmerber*'s reasoning reflects a totality of the circumstances approach to determining "whether the police were justified in requiring petitioner to submit to the blood test, and whether the means and procedures employed in taking his blood respected relevant Fourth Amendment standards of reasonableness." *Schmerber*, 384 U.S. at 768.

Emphasizing that a warrantless blood test impacts "interests in human dignity and privacy which the Fourth Amendment protects," *id.* at 769-70, the Court in *Schmerber* did not limit its analysis to the evanescent nature of alcohol in the bloodstream, the significant but single factor shared by *Schmerber* and the present case. Instead, it looked to the circumstances faced by the arresting officer to determine whether the facts substantiated the officer's conclusion that a warrantless search was constitutionally justified. The Court observed that "the percentage of alcohol in the blood begins to diminish shortly after the drinking stops," *id.* at 770, but was also careful to note other "special facts"—that "time had to be taken to bring the accused to a hospital and to investigate the scene of the accident," leaving the officer "no time to seek out a magistrate and secure a warrant"—before concluding that the arresting officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.'" *Id.* at 770-71 (quoting *Preston v. United States*, 376 U.S. 364, 367 (1964)).

The Missouri Supreme Court correctly applied *Schmerber*'s totality of the circumstances test to the

quite different facts of the present case. Unlik *Schmerber*, there was no accident and the defen required no medical care. With the aid of prepared forms and the availability of teleph warrants, Corporal Winder had in the past obta warrants for blood draws in drunk driving cases had no reason to believe he could not do so in case. (Tr. at 15:25-17:10.) All evidence suppo Winder's testimony that the circumstances prese no exigency. The court properly held, therefore, the state failed to identify an exigency on the fac this "run of the mill" DWI investigation (*Id.* at 3(.20) to justify an exception to the strin requirement that the police obtain a warrant be "'invad[ing] another's body in search of evide (Pet. App. at 20a (quoting *Schmerber*, 384 U.S 770)).

In any event, the question of whether Missouri Supreme Court properly balanced relevant factors does not merit this Court's ple review. *See Kentucky v. King*, --- U.S. ---, 131 S 1849, 1863 (2011) ("Any question about whethe exigency actually existed is better addressed by Kentucky Supreme Court on remand."); *Kir Louisiana*, 536 U.S. 635, 638 (2002) (per cur (reversing state-court judgment that exi circumstances were not required for warran home entry and remanding for state court determine whether exigent circumstances present); *Mapp v. Ohio*, 367 U.S. 643, 653 (1 ("Because there can be no fixed formula, we admittedly met with recurring questions of reasonableness of searches, but less is not t expected when dealing with a Constitution, an any rate, reasonableness is in the first instanc

the trial court to determine." (internal quotation marks and brackets omitted)).

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be denied.

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Dated: July 25, 2012

REPLY BRIEF

RECORD AND BRIEFS

No. 11-1425

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In The
Supreme Court of the United States

STATE OF MISSOURI,

Petitioner,

v.

TYLER G. McNEELY,

Respondent.

On Petition For A Writ Of Certiorari To The Missouri Supreme Court

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a law enforcement officer may obtain a nonconsensual and warrantless blood sample from a drunk driver under the exigent circumstances exception to the Fourth Amendment warrant requirement based upon the natural dissipation of alcohol in the bloodstream.

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A. Lower Courts Are Deeply Divided In Their Interpretations Of This Court's Decision In *Schmerber v. California*, 384 U.S. 757 (1966)

It is an undeniable fact that lower courts throughout the United States are sharply divided in their respective interpretations of this Court's decision in *Schmerber*. Although Respondent acknowledges the existence of this conflict, Respondent nonetheless attempts to dramatically minimize its size and scope (Br. in Opp. 14-23). The petition highlighted no less than twelve state courts of last resort and four federal circuits that have confronted this issue, many of which have openly discussed the conflict. Indeed, in the case under review, the Missouri Supreme Court directly addressed the existence of the widespread conflict among state courts of last resort. The Missouri Supreme Court came down on one side of the conflict, endorsing the reasoning of the Utah Supreme Court and the Iowa Supreme Court (Pet. App. 10a-13a), while explicitly disavowing the reasoning of the Wisconsin Supreme Court, the Minnesota Supreme Court, and the Oregon Supreme Court (Pet. App. 16a-19a). Clearly, the decision of the Missouri Supreme Court has deepened the division among lower courts.

The cases cited in the petition, however, do not represent an exclusive or exhaustive list of courts confronting this issue. Additionally, a considerable number of other lower courts have likewise debated how best to interpret *Schmerber*. For example, in *Dale v. State*, 209 P.3d 1038 (Alaska Ct. App. 2009),

the Court of Appeals of Alaska openly discussed the conflict:

> *Schmerber* has led to two opposing interpretations by various state supreme courts. Some states have concluded that *Schmerber* holds that investigating officers are never required to obtain a warrant when sufficient probable cause exists in suspected drunk-driving cases and the method used to extract the suspect's blood is reasonable. Other states have interpreted *Schmerber* to require a case-specific analysis, taking into consideration the totality of the circumstances in determining whether exigent circumstances exist, before the police can seize a person's blood without a warrant.

Id., at 1040-1041. The Alaska court proceeded to adopt a broad interpretation of *Schmerber*, concluding that exigent circumstances existed even if the investigating officer had time to obtain a warrant before drawing the defendant's blood. The Court found that the natural dissipation of alcohol from the defendant's blood over time created an urgency for the blood draw, and requiring the arresting officer to evaluate how much delay would be involved in obtaining a warrant would place an unreasonable burden on law enforcement. *Id.*, at 1043-1044 (endorsing the reasoning of the Minnesota Supreme Court in *State v. Shriner*, 751 N.W.2d 538 (Minn. 2008)).

The Colorado Supreme Court reached the opposite result. Adopting a more restrictive interpretation

of *Schmerber*, the Colorado Supreme Court has held the state must first demonstrate that circumstances existed which would have made it impractical to obtain a search warrant before a warrantless blood draw may be justified. See *People v. Sutherland*, 683 P.2d 1192, 1194 (Colo. 1984); *People v. Shepherd*, 906 P.2d 607, 610 (Colo. 1995).

In contrast, the Court of Criminal Appeals of Tennessee adopted a much broader interpretation of *Schmerber* in *State v. Humphreys*, 70 S.W.3d 752 (Tenn.Crim.App. 2001). There, the defendant was convicted of a misdemeanor offense of driving under the influence of alcohol after being pulled over in a routine traffic stop. *Id.*, at 756. Relying on *Schmerber*, the Court found the warrantless blood test was reasonable under the Fourth Amendment. The Court held that "based upon the fact that evidence of blood alcohol content begins to diminish shortly after drinking stops, a compulsory breath or blood test, taken with or without the consent of the donor, falls within the exigent circumstances exception to the warrant requirement." *Id.*, at 760-761.[1]

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[1] See also *State v. Fletcher*, 688 S.E.2d 94, 97-98 (N.C. Ct. App. 2010) (finding that "probable cause and the 'destruction of evidence' caused by the body's diminution of alcohol in the bloodstream together meet the Fourth Amendment's requirements for a reasonable . . . [and] warrantless search of the person" under *Schmerber*); *State v. Stern*, 846 A.2d 64, 69 (N.H. 2004) (finding that because alcohol in the blood becomes diminished with the passage of time, any significant delay in taking a blood sample may deprive the state of reliable evidence of a

(Continued on following page)

The Virginia Supreme Court reached a different conclusion in *Bristol v. Commonwealth*, 636 S.E.2d 460 (Va. 2006). Noting that the possibility that blood alcohol content may dissipate exists in every instance in which a driver has consumed alcoholic beverages, the Court held that "[t]he mere fact that a defendant's blood alcohol content might dissipate is insufficient, by itself, to support application of the 'exigent circumstances' exception." *Id.*, at 464.

Without question, there is a longstanding and deep conflict among lower courts over their respective interpretations of this Court's decision in *Schmerber*. This conflict will undoubtedly continue to divide lower courts throughout the United States until this Court takes action to clarify the holding in *Schmerber*.

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defendant's condition at the time they drove an automobile); *State v. Kristy*, 528 A.2d 390, 392 (Conn.App.Ct. 1987) (finding that *Schmerber* held the search was reasonable "[o]n the basis of three considerations, namely the existence of probable cause, the evanescent nature of the evidence and the reasonableness of the intrusion"); *Commonwealth v. Anderl*, 477 A.2d 1356, 1364 (Pa.Super.Ct. 1984) (holding warrantless breath test was valid as "a search necessitated by exigent circumstances; i.e., the evanescent nature of the alcohol in [defendant's] bloodstream."); *Aliff v. State*, 627 S.W.2d 166, 170 (Tex.Crim.App. 1982) (upholding the warrantless taking of a blood sample because "alcohol in blood is quickly consumed and the evidence would be lost forever."); *DeVaney v. State*, 288 N.E.2d 732, 735 (Ind. 1972) (finding that "exigent circumstances were . . . present since the evidence might soon disappear during the time necessary to obtain the warrant.").

B. This Case Presents An Excellent Vehicle To Resolve The Conflict

Although the existence of a widespread split of authority is clear, Respondent nevertheless maintains this Court should deny certiorari because of three purported vehicle problems. (Br. in Opp. 5-14.) The purported vehicle problems identified by Respondent, however, are illusory and pose no obstacle to this Court's resolution of the question presented.

1. First, Respondent asserts this case is a poor vehicle to resolve the conflict because the arresting officer testified at the suppression hearing that his decision to take Respondent to the hospital for a blood draw was not motivated by any particular concern that an emergency situation existed. (Br. in Opp. 6-7.) Rather, the officer's decision was primarily motivated by his understanding of a recently amended state law governing nonconsensual blood draws. (Tr. 10:11-13, 14:7-22.) Respondent, therefore, strongly urges this Court to pay careful attention to the subjective motivations and intentions of the arresting officer and focus on his subjective state of mind. This Court, however, has consistently rejected such an approach. This Court has repeatedly held that a law enforcement officer's subjective motivation for conducting a search is irrelevant in the Fourth Amendment context. See *Brigham City v. Stuart*, 547 U.S. 398, 404 (2006). Instead, an action is reasonable under the Fourth Amendment, regardless of the individual officer's state of mind, as long as the circumstances, viewed *objectively*, justify the action. *Id.* See also

Bond v. United States, 529 U.S. 334, 338, n.2 (2000) ("[T]he subjective intent of the law enforcement officer is irrelevant in determining whether that officer's actions violate the Fourth Amendment . . . ; the issue is not his state of mind, but the objective effect of his actions"); *Kentucky v. King*, 131 S.Ct. 1849, 1859 (2011) ("Indeed, we have never held, outside limited contexts such as an 'inventory search or administrative inspection . . . , that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment.'") (quoting *Whren v. United States*, 517 U.S. 806, 812 (1996)). When a law enforcement officer has probable cause to believe a person has committed a drunk-driving related crime, it is certainly *objectively* reasonable to conclude that blood alcohol evidence will continue to dissipate during the inevitable delay necessary to obtain a search warrant and thus threaten the potential destruction of evidence.[2]

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[2] Although the arresting officer had never been unable to obtain a search warrant because of the unavailability of a prosecutor or a judge, there is often a significant delay involved in acquiring a warrant in the middle of the night. Indeed, the record in this case established that obtaining a search warrant in the middle of the night in Cape Girardeau County involves an average delay of approximately two hours. (Tr. 27-28.) Additionally, Respondent incorrectly suggested that the arresting officer had used telephonic warrants in the past. (Br. in Opp. 28.) Telephonic search warrants are not available in Missouri. Search warrants in Missouri are governed by Mo. Rev. Stat. § 542.276 (2010), which requires the application, the warrant, and any accompanying affidavit to be in writing. Section 542.276.3 specifically

(Continued on following page)

2. Next, Respondent claims the record in this case is insufficient for proper resolution of the Fourth Amendment issue because there was no testimony from a qualified expert to discuss the "complicated science of alcohol metabolism." (Br. in Opp. 5, 8-12.) Respondent suggests that a full understanding of a controversial scientific technique known as "retrograde extrapolation" is critical to resolving the constitutional issue presented in this case. (Br. in Opp. 10-12.) Even still, Respondent concedes that there are serious flaws with this technique, noting that there are several reasons why retrograde extrapolation may yield questionable results. (Br. in Opp. 10-11 n.6.) The simple fact remains, however, that there has never been any dispute that alcohol dissipates from the blood after consumption. It is a well-known fact,

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prohibits oral testimony from being considered. Regardless, a number of jurisdictions that authorize the use of telephonic warrants have concluded that the availability of this procedure does not diminish the exigency involved in quickly securing blood alcohol evidence. See *United States v. Reid*, 929 F.2d 990, 993 (4th Cir. 1991) (analyzing the "intricate requirements" of obtaining a telephonic warrant and finding that the availability of the procedure "does not alter the exigency of the situation."); *State v. Shriner*, 751 N.W.2d 538, 549, n.13 (Minn. 2008) (noting that a telephonic search warrant does not eliminate the need for documentation and concluding that "the officer facing the need for a telephonic search warrant cannot be expected to know how much delay will be caused by following the procedures necessary to obtain such a warrant."); *State v. Johnson*, 744 N.W.2d 340, 345 (Iowa 2008) (discussing the complicated requirements for obtaining a telephonic search warrant and finding that its availability did not reduce the exigency).

and one which this Court recognized in *Schmerber,* that "the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system." *Schmerber,* 384 U.S., at 770. The record in this case accurately stated that the generally accepted rate at which alcohol is eliminated from the human body is anywhere between 0.015 and 0.020 per hour. (Tr. 21-22.) This fact has long been generally accepted in the scientific community and was never in dispute. See K.M. Dubowski, Ph.D., Human Pharmacokinetics of Alcohol, Int. Microform L. Leg. Med. 10 (1975); Yale H. Caplan, Ph.D., The Determination of Alcohol in Blood and Breath, 1 Forensic Sciences Handbook ch. 12 (1982).

3. Finally, Respondent suggests this Court should deny certiorari because the state does not necessarily need the blood test in order to secure a conviction. (Br. in Opp. 12-14.) Respondent proceeds to speculate that the state may still be able to secure a conviction based primarily on Respondent's refusal to submit to a breath or blood test and his poor performance on various field sobriety tests.[3] (Br. in Opp.

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[3] Respondent correctly concedes, however, that "[n]one of this necessarily means that the prosecution will secure a conviction if the case is allowed to proceed to trial." (Br. in Opp. 14.) Furthermore, a warrantless blood draw must be supported by probable cause, i.e., probable cause to believe the accused has committed a drunk driving-related crime. Thus, in every such case, there will *always* be at least some additional evidence against the accused aside from the results of the blood test.

13.) The position taken by Respondent, however, drastically undervalues the highly probative nature of blood alcohol evidence.

This Court has repeatedly emphasized the importance of blood alcohol evidence in drunk driving prosecutions. See *Breithaupt v. Abram*, 352 U.S. 432, 439 (1957) (finding that a blood test "is a scientifically accurate method of detecting alcoholic content in the blood, thus furnishing an *exact* measure upon which to base a decision as to intoxication") (emphasis added). Indeed, in *Breithaupt* this Court noted that, by utilizing blood tests, "the issue of driving while under the influence of alcohol can often . . . be taken out of the confusion of conflicting contentions." *Id.*, at 439-440. Then, in *Schmerber,* this Court found that "[e]xtraction of blood samples for testing is a highly effective means of determining the *degree* to which a person is under the influence of alcohol." *Schmerber*, 384 U.S., at 771 (emphasis added). Significantly, nineteen years after writing the majority opinion of this Court in *Schmerber*, Justice Brennan reinforced just how crucial blood alcohol evidence is in drunk driving prosecutions. Writing the majority opinion in *Winston v. Lee*, 470 U.S. 753 (1985), Justice Brennan stressed that "[e]specially given the difficulty of proving drunkenness by other means, . . . results of the blood test were of vital importance if the State were to enforce its drunken driving laws." *Id.*, at 763. See also *South Dakota v. Neville*, 459 U.S. 553, 564 (1983) (noting that "the inference of intoxication arising from a positive blood-alcohol test is far

stronger than that arising from a refusal to take the test.").

In the case under review, Respondent's blood alcohol level was 0.154, nearly twice the legal limit. (Record on Appeal: Legal File p. 26; Tr. 11:21-22.) Obviously, the results of the blood test give the state a far stronger case at trial. Speculation that the state *might* be able to secure a conviction without the best and most probative evidence is not, by any means, a compelling reason for this Court to avoid resolving the important constitutional question presented in this case.

Contrary to Respondent's claims, this case presents an excellent vehicle through which to resolve the widely recognized conflict over the interpretation of *Schmerber*. The facts are undisputed and straightforward. The issue is squarely presented. Quite simply, this petition offers an ideal opportunity to finally resolve this widespread and divisive conflict.

C. Uniform And Consistent National Standards Are Important Because Drunk Driving Is A Nationwide Problem

Drunk driving is a serious problem that affects the entire nation. See *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 451 (1990); see also *Leocal v. Ashcroft*, 543 U.S. 1, 13 (2004). Given the nationwide scope of the drunk driving problem, uniform and consistent standards are of vital importance. For instance, on March 3, 1998, President Clinton signed

an Executive Memorandum for the Secretary of Transportation, calling for the establishment of a national drunk driving standard. *Memorandum on Standards To Prevent Drinking and Driving,* March 3, 1998 [Public Papers of the Presidents of the United States: William J. Clinton (1998, Book I, p. 318)]. This directive called for a plan to promote the adoption of 0.08 Blood Alcohol Content (BAC) as the nationwide legal limit for impaired driving. At the time, 33 states and the District of Columbia continued to use 0.10 as the legal limit. *Id.* President Clinton noted that drunk driving remained a serious highway safety problem, costing society thousands of lives and $45 billion every year. *Id.* In an effort to "prevent the many tragic and unnecessary alcohol-related deaths and injuries that occur on our Nation's roads," President Clinton called on the Congress to pass legislation to ensure that 0.08 BAC would become the national legal limit. *Id.* The effort was successful. In October of 2000, the Congress passed, and the President signed into law, the Department of Transportation and Related Agencies Act of 2001, Pub. L. No. 106-346. Among other things, the law required states to implement a 0.08 BAC standard as the legal limit for drunk driving by 2004 or risk losing a percentage of federal highway funds. By 2004, all 50 states had enacted laws establishing 0.08 BAC as the legal limit, and a national drunk driving standard was achieved.

President Clinton and the Congress recognized that, given the nationwide scope of the drunk driving

problem, a uniform and consistent national standard was important and necessary. It is of even greater importance to have uniform and consistent application of basic constitutional principles. The intervention of this Court is imperative. Lower courts will continue to adopt conflicting interpretations of this Court's decision in *Schmerber,* and thereby continue to implement inconsistent applications of the Fourth Amendment, until this Court takes action to resolve the conflict.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

OFFICE OF THE PROSECUTING ATTORNEY
CAPE GIRARDEAU COUNTY, MISSOURI
H. MORLEY SWINGLE, Prosecuting Attorney

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Attorneys for Petitioner
State of Missouri

JOINT APPENDIX

RECORD AND BRIEFS

No. 11-1425

Supreme Court, U.S.
FILED
NOV 9 2012
OFFICE OF THE CLERK

In The
Supreme Court of the United States

STATE OF MISSOURI,

Petitioner,

v.

TYLER G. McNEELY,

Respondent.

On Writ Of Certiorari To The Missouri Supreme Court

JOINT APPENDIX

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Petition For Writ Of Certiorari Filed May 22, 2012
Petition For Writ Of Certiorari Granted September 25, 2012

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State of Missouri v. Tyler G. McNeely
Case # 10CG-CR01849
Cape Girardeau County Circuit Court, Associate Division
Relevant Docket Entries

10/03/2010 **Judge Assigned**

Complaint Filed
Filed By:
MICHAEL GERARD MUETH JR

Probable Cause Statement Filed

OCN Filed
G7020967

Warrant Issued

Document ID: 10-CJARW-782, for MCNEELY, TYLER GUY., Bond Amount: 5,000.00, Bond Text: CASH OR SURETY

Bond-Surety Bond Posted
$5,000.00 SURETY BOND POSTED BY WM. KEITH DOUGLAS RETURNABLE 10/04/10 1:00 PM

10/04/2010 **Initial Arraignment Scheduled**

Scheduled For: 10/04/2010; 1:00 PM ; GARY ALBERT KAMP; Cape Girardeau (Jackson)

Warrant Served

Document ID – 10-CJARW-782; Served To – MCNEELY, TYLER GUY; Server – SO CAPE GIRARDEAU CO-JACKSON; Served Date – 05-OCT-10; Served Time – 00:00:00; Service Type – Sheriff Department; Reason Description – Served

Initial Arraignment Hrng Held

STATE BY JULIA MEINERS, ASS'T PROSECUTING ATTORNEY. DEFENDANT IN PERSON. WAIVES FORMAL READING OF CHARGE. CONTINUED 10/25/10, AT 1:00 PM RETAIN COUNSEL.

Scheduled For: 10/04/2010; 1:00 PM ; GARY ALBERT KAMP; Cape Girardeau (Jackson)

Waiver of Formal Arraignment

Counsel Status Hrng Scheduled

Scheduled For: 10/25/2010; 1:00 PM ; GARY ALBERT KAMP; Cape Girardeau (Jackson)

10/14/2010 **Entry of Appearance Filed**
Filed By: STEPHEN C WILSON

Mot to Produce Documents
Filed By: STEPHEN C WILSON

Filing:
SUPPLEMENTAL MOTION TO PRODUCE
Filed By: STEPHEN C WILSON

Hearing/Trial Cancelled
Scheduled For: 10/25/2010; 1:00 PM ; GARY ALBERT KAMP; Cape Girardeau (Jackson)

Motion for Change of Judge
Filed By: STEPHEN C WILSON

Motion Granted/Sustained

Ord Transfer P/Judge for Assn

NOTICE REQUIRING ASSIGNMENT FORWARDED TO PRESIDING JUDGE FOR REASSIGNMENT

10/15/2010 **Judge Assigned**

Order for Change of Judge

IT IS HEREBY ORDERED THAT THIS CAUSE BE ASSIGNED TO HON. MICHAEL J BULLERDIECK /S/ WILLIAM SYLER PRESIDING JUDGE

10/19/2010 **Criminal Setting Scheduled**

Scheduled For: 11/10/2010; 8:30 AM ; MICHAEL J BULLERDIECK; Cape Girardeau (Jackson)

11/10/2010 **Hearing Held**

STATE BY JULIE HUNTER,ASS'T PROSECUTING ATTY. DEFT IN PERSON AND BY STEPHEN WILSON, ATTY. CAUSE SET FOR PRELIMINARY HEARING 12-01-10 2:00PM.

Scheduled For: 11/10/2010; 8:30 AM ; MICHAEL J BULLERDIECK; Cape Girardeau (Jackson)

Preliminary Hearing Scheduled

Scheduled For: 12/01/2010; 2:00 PM ; MICHAEL J BULLERDIECK; Cape Girardeau (Jackson)

12/01/2010 Hearing/Trial Cancelled

Scheduled For: 12/01/2010; 2:00 PM ; MICHAEL J BULLERDIECK; Cape Girardeau (Jackson)

Bndover Circ-Waive Prel Hrng

STATE BY MICHAEL MUETH, ASSISTANT PROSECUTING ATTORNEY. DEFENDANT IN PERSON AND BY STEPHEN WILSON, ATTY. DEFENDANT REQUESTS TO WAIVE PRELIMINARY HEARING. REQUEST GRANTED. AFTER ADVISING DEFENDANT OF ALL RIGHTS, COURT FINDS DEFENDANT HAS FREELY, KNOWINGLY AND VOLUNTARILY WAIVED RIGHT TO PRELIMINARY HEARING. COURT ORDERS DEFENDANT BOUND TO CIRCUIT COURT, DIVISION II, RETURNABLE 12-13-10 9:00AM.

State of Missouri v. Tyler G. McNeely
Case # 10CG-CR01849-01
Cape Girardeau County Circuit Court
Relevant Docket Entries

12/01/2010 Judge Assigned

Arraignment Scheduled

Scheduled For: 12/13/2010; 10:30 AM ; BENJAMIN FREDERICK LEWIS; Cape Girardeau (Jackson)

12/06/2010 Information Filed

Filed By:
MICHAEL GERARD MUETH JR

Mot to Produce Documents

Filed By:
MICHAEL GERARD MUETH JR

Filing:

Notice of Disclosure

Filed By:
MICHAEL GERARD MUETH JR

12/13/2010 Arraignment Held

State appears by Angel Woodruff, Asst. Prosecuting Attorney. Defendant appears in person and by attorney Stephen Wilson.

Scheduled For: 12/13/2010; 10:30 AM ; BENJAMIN FREDERICK LEWIS; Cape Girardeau (Jackson)

Waiver of Formal Arraignment

Plea of Not Guilty Entered

Motion Hearing Scheduled

Scheduled For: 01/14/2011; 9:00 AM ; BENJAMIN FREDERICK LEWIS; Cape Girardeau (Jackson)

12/23/2010 **Motion to Suppress**

Filed By: STEPHEN C WILSON

01/14/2011 **Motion Hearing Held**

State appears by Jack Koester, Asst. Prosecuting Attorney. Defendant appears in person and by attorney Stephen Wilson. Cause proceeds for hearing. Testimony is heard and evidence adduced. Cause is taken under advisement pending filing of briefs, which shall be submitted to the Court by Monday, February 14, 2011.

Scheduled For: 01/14/2011; 9:00 AM ; BENJAMIN FREDERICK LEWIS; Cape Girardeau (Jackson)

Cause Taken Under Advisement

Filed By:
BENJAMIN FREDERICK LEWIS

Plea/Trial Setting Scheduled

Scheduled For: 02/28/2011; 1:00 PM ; BENJAMIN FREDERICK LEWIS; Cape Girardeau (Jackson)

02/18/2011 **Filing of Briefs**
Filed By: JOHN N KOESTER JR

Filing of Briefs
Filed By: STEPHEN C WILSON

02/28/2011 **Hearing Continued/Rescheduled**

State appears by Angel Woodruff, Asst. Prosecuting Attorney. Defendant appears in person and by attorney Stephen Wilson.; Continuance Reason – Request of Court; Continuance Requestor – Court
Hearing Continued From:
02/28/2011; 1:00 PM Plea/Trial Setting

Plea/Trial Setting Scheduled

Scheduled For: 03/14/2011; 1:30 PM ; BENJAMIN FREDERICK LEWIS; Cape Girardeau (Jackson)

03/03/2011 **Order**

Order and Judgment on Defendant's Motion to Suppress
Filed By:
BENJAMIN FREDERICK LEWIS

Motion Granted/Sustained

Filed By:
BENJAMIN FREDERICK LEWIS

03/04/2011 **Notice of Appeal Filed**

Notice of Appeal and Criminal Case Information Form with Brief Statement of Case filed.
Filed By: JOHN N KOESTER JR

03/07/2011	**Certificate of Mailing** Notice of Appeal and attachments sent by certified mail to the Clerk of the Missouri Court of Appeals, Eastern District, Attorney General, and to attorney Stephen C. Wilson.
03/10/2011	**Hearing Continued/Rescheduled** **Hearing Continued From:** 03/14/2011; 1:30 PM Plea/Trial Setting **Plea/Trial Setting Scheduled** **Scheduled For:** 06/13/2011; 1:30 PM ; BENJAMIN FREDERICK LEWIS; Cape Girardeau (Jackson)
03/15/2011	**Ackn Notice of Appeal Filed** Appeal No. ED96402
03/17/2011	**Transcript on Appeal** filed by Brenda Wills-Christensen, Official Court Reporter, Division II
03/18/2011	**Legal File Index Filed** **Filed By:** JOHN N KOESTER JR
03/21/2011	**Ackn Notice of Appeal Filed** Corrected Acknowledgement filed by Missouri Court of Appeals
06/13/2011	**Hearing Continued/Rescheduled** State appears by Jack Koester, Asst. Prosecuting Attorney. Defendant appears not but by attorney Stephen Wilson. **Plea/Trial Setting Scheduled**

Scheduled For: 07/11/2011; 1:30 PM ; BENJAMIN FREDERICK LEWIS; Cape Girardeau (Jackson)

06/27/2011 **Judge/Clerk – Note**
Notification received from The Clerk of The Supreme Court of Missouri that the file was received from the Missouri Court of Appeals and filed. Supreme Court No. SC91850

07/11/2011 **Hearing Continued/Rescheduled**
State appears by Angel Woodruff, Asst. Prosecuting Attorney.
Defendant appears not but by attorney Stephen Wilson.
Hearing Continued From:
07/11/2011; 1:30 PM Plea/Trial Setting

Plea/Trial Setting Scheduled

Scheduled For: 10/24/2011; 1:30 PM ; BENJAMIN FREDERICK LEWIS; Cape Girardeau (Jackson)

10/24/2011 **Hearing Continued/Rescheduled**
State appears by Angel Woodruff, Asst. Prosecuting Attorney.
Defendant appears in person and by attorney Stephen Wilson.
Hearing Continued From:
10/24/2011; 1:30 PM Plea/Trial Setting

Plea/Trial Setting Scheduled

Scheduled For: 12/12/2011; 11:30 AM ; BENJAMIN FREDERICK LEWIS; Cape Girardeau (Jackson)

12/12/2011 **Hearing Continued/Rescheduled**
State appears by Angel Woodruff,
Asst. Prosecuting Attorney.
Defendant appears in person and
by attorney Stephen Wilson.
Hearing Continued From:
12/12/2011; 11:30 AM Plea/Trial Setting

Plea/Trial Setting Scheduled

Scheduled For: 01/23/2012; 10:30 AM ;
BENJAMIN FREDERICK LEWIS;
Cape Girardeau (Jackson)

01/19/2012 **Filing:**
Opinion received from the Supreme
Court of Missouri en banc in re
Appeal No. SC91850 affirming
judgment of the trial court.

01/23/2012 **Hearing Continued/Rescheduled**
State appears by Angel Woodruff,
Asst. Prosecuting Attorney.
Defendant appears in person and
by attorney Stephen Wilson.

Hearing Continued From:
01/23/2012; 10:30 AM Plea/Trial Setting

Plea/Trial Setting Scheduled

Scheduled For: 05/29/2012; 10:30 AM ;
BENJAMIN FREDERICK LEWIS;
Cape Girardeau (Jackson)

01/24/2012 **Filing:**
Copy of opinion in State of Missouri
Supreme Court no. SC91850 filed

01/25/2012 **Filing:**
Mandate from the Supreme Court of Missouri en banc Appeal SC91850 affirming the judgment of the trial court.

03/08/2012 **Filing:**
Certified copy of the ruling filed by the Supreme Court of Missouri

05/29/2012 **Hearing Continued/Rescheduled**
State appears by Angel Woodruff, Asst. Prosecuting Attorney.
Defendant appears not but by attorney Stephen Wilson.
Hearing Continued From:
05/29/2012; 10:30 AM Plea/Trial Setting

Plea/Trial Setting Scheduled
Scheduled For: 10/22/2012; 12:00 AM ; BENJAMIN FREDERICK LEWIS; Cape Girardeau (Jackson)

Filing:
Copy of Petition for a Writ of Certiorari in the Supreme Court of the United States filed.

State of Missouri v. Tyler G. McNeely
Case # ED96402
Missouri Court of Appeals, Eastern District
Relevant Docket Entries

03/04/2011	**NOA Filed in Circuit Court**
	No Filing Fee Due
03/10/2011	**NOA Filed in Appellate Court**
03/16/2011	**Correspondence Received**
	LETTER REQUESTING ATTORNEYS OF RECORD BE CORRECTED **Filed By:** JOHN N. KOESTER
03/21/2011	**Legal File &Trans/ROA Complete**
04/01/2011	**Entry of Appearance Filed** **Filed By:** STEPHEN C WILSON
04/06/2011	**Case Docketed** DIVISION 4: Odenwald, Kurt S., P.J.; Dowd, Robert G., Jr., J.; Kramer, Gary, Sp.J. June 8, 2011 Division Courtroom
04/20/2011	**Appellants Brief** **Filed By:** JOHN N. KOESTER
05/10/2011	**Mot for Ext Time to File Brief** **Filed By:** STEPHEN C WILSON
05/12/2011	**Respondents Brief** **Filed By:** STEPHEN C WILSON
	Granted Until MAY 13, 2011

06/08/2011	**Case Submitted** **Scheduled For:** 06/08/2011; ; DIVISION 4; EASTERN DISTRICT CT OF APPEALS
06/21/2011	**Signed Majority Opinion** **Opinion- Transferred to SC**
06/22/2011	**Tran W/Opn SC-Maj Opn Appl Ct**

State of Missouri v. Tyler G. McNeely
Case # SC91850
Missouri Supreme Court
Relevant Docket Entries

06/21/2011	**Order/Opin Tran by COA Issued**
06/23/2011	**Record on Appeal Transferred** CLERK, MISSOURI COURT OF APPEALS, EASTERN DISTRICT, FILED THE ENTIRE FILE HEREIN PURSUANT TO THE OPINION OF SAID COURT DATED JUNE 21, 2011. THE FILE CONSISTS OF THE NOTICE OF APPEAL, RECORD ON APPEAL (ONE VOLUME OF LEGAL FILE AND ONE VOLUME OF TRANSCRIPT), APPELLANT'S BRIEF, RESPONDENT'S BRIEF, ORAL ARGUMENT CD, AND ORIGINAL AND DUPLICATE COPIES OF CASE RELATED DOCUMENTS. **No Filing Fee Due**
07/11/2011	**Substitute Appellant's Brief** FILED WITH SERVICE. **Filed By:** JOHN NICHOLAS KOESTER JR. **On Behalf Of:** STATE OF MISSOURI
07/26/2011	**Mot Ext Time to File Brief** RESPONDENTS MOTION FOR EXTENSION OF TIME TO FILE SUBSTITUTE BRIEF FILED. **Filed By:** STEPHEN C. WILSON **On Behalf Of:** TYLER G. MCNEELY

Sustained Until
AUGUST 10, 2011. RESPONDENT'S SUBSTITUTE BRIEF IS NOW DUE ON OR BEFORE AUGUST 10, 2011.

08/01/2011 **Amicus Curiae Brief**
FILED WITH SERVICE AND CONSENT OF THE PARTIES BY THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF KANSAS AND WESTERN MISSOURI AND THE AMERICAN CIVIL LIBERTIES UNION OF EASTERN MISSOURI.
Filed By:
STEPHEN DOUGLAS BONNEY
On Behalf Of: AMERICAN CIVIL LIBERTIES UNION OF KANSAS/ WESTERN MISSOURI, AMERICAN CIVIL LIBERTIES UNION OF EASTERN MISSOURI

08/10/2011 **Substitute Respondent's Brief**
FILED WITH SERVICE.
Filed By: STEPHEN C. WILSON
On Behalf Of: TYLER G. MCNEELY

Amicus Curiae Brief
OF MISSOURI ASSOCIATION OF CRIMINAL DEFENSE LAWYERS'
FILED WITH SERVICE.
Filed By: TALMAGE E. NEWTON IV
On Behalf Of: MISSOURI ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

08/22/2011	**Substitute Reply Brief** FILED WITH SERVICE. **Filed By:** JOHN NICHOLAS KOESTER JR. **On Behalf Of:** STATE OF MISSOURI
09/14/2011	**Mot to File Brief Out of Time** Motion to File Amicus Brief Out of Time; Electronic Filing Certificate of Service. **Filed By:** JAMES B. FARNSWORTH **On Behalf Of:** MISSOURI ATTORNEY GENERAL
	Note to Clerk eFiling **Filed By:** JAMES B. FARNSWORTH **On Behalf Of:** MISSOURI ATTORNEY GENERAL
	Sustained
09/15/2011	**Amicus Curiae Brief** Amicus Brief in Support of Appellant; Electronic Filing Certificate of Service. **Filed By:** JAMES B. FARNSWORTH **On Behalf Of:** MISSOURI ATTORNEY GENERAL
09/21/2011	**Case Docketed** CAUSE DOCKETED FOR ORAL ARGUMENT ON NOVEMBER 10, 2011. PLEASE SEE ATTACHED DOCKET LETTER, DOCKET, AND NOTICES TO COUNSEL.
09/30/2011	**Clerk Remark** HARD COPY OF SEPTEMBER 21, 2011, DOCKET LETTER SENT VIA REGULAR POSTAL MAIL TO ALL COUNSEL OF RECORD ON THIS DATE.

11/01/2011	**Court Order Issued** ORDER ISSUED APPOINTING THE HONORABLE JODIE CAPSHAW ASEL AS SPECIAL JUDGE. (DRAPER, J., NOT PARTICIPATING). ORDER AVAILABLE TO COUNSEL VIA SECURED CASE.NET.
	Not Participating Not Participating – George W. Draper III
11/10/2011	**Case Submitted** ARGUED AND SUBMITTED. DRAPER, J., NOT PARTICIPATING. ASEL, SP.J., PARTICIPATING. **Scheduled For:** 11/10/2011; ; SUPREME COURT OF MISSOURI; Setting: 4; SUPREME COURT OF MISSOURI
01/17/2012	**Per Curiam Majority Opinion**
	Other Opinion AFFIRMED AND REMANDED. TEITELMAN, C.J., RUSSELL, BRECKENRIDGE, FISCHER, STITH AND PRICE, JJ., AND ASEL, SP.J., CONCUR. DRAPER, J., NOT PARTICIPATING.
	Not Participating Not Participating – George W. Draper III
01/25/2012	**Motion for Rehearing** Motion for Rehearing and Suggestions in Support Thereof; Electronic Filing Certificate of Service. **Filed By:** JOHN NICHOLAS KOESTER JR. **On Behalf Of:** STATE OF MISSOURI

	Note to Clerk eFiling **Filed By:** JOHN NICHOLAS KOESTER JR.
03/06/2012	**Overruled** DRAPER, J., NOT PARTICIPATING.
	Case Disp- Opin & Mandate Sent CERTIFIED COPY OF OPINION AND MANDATE SENT TO THE CIRCUIT CLERK OF CAPE GIRARDEAU COUNTY. OPINION RELEASE SHEET FAXED AND MAILED TO PAT DELEE WITH THOMSON REUTERS.
05/29/2012	**Correspondence Received** LETTER DATED MAY 25, 2012, RECEIVED FROM THE SUPREME COURT OF THE UNITED STATES ADVISING THE PETITION FOR WRIT OF CERTIORARI WAS PLACED ON THEIR DOCKET.
10/01/2012	**Correspondence Received** LETTER DATED SEPTEMBER 25, 2012, FROM THE SUPREME COURT OF THE UNITED STATES ADVISING THAT THE PETITION FOR WRIT OF CERTIORARI WAS GRANTED ON THAT DATE.

PROBABLE CAUSE STATEMENT
Cape Girardeau County

Fingerprints Not Taken ☐
Offense Cycle Number: G7020967

Date: 10/3/10

I, M. A. Winder, knowing that false statements on this form are punishable by law, state that the facts contained herein are true.

1. I have probable cause to believe that on October 3, 2010, at / on US 61, Tyler Guy McNeely, committed one or more criminal offenses.

2. The facts supporting this belief are as follows:

On Sunday, October 3, 2010, at 0208 hours, I was on routine patrol on northbound US 61 in the City of Cape Girardeau. I observed a white 2003 Ford F150, bearing Missouri license [omitted in printing], traveling south on US 61. The vehicle appeared to be traveling above the posted 45 mile per hour speed limit. I checked the vehicles speed at 56 miles per hour. I made a U-turn and began to overtake the vehicle. As I was overtaking the vehicle, I observed it cross the centerline three times. I stopped the vehicle and made contact with the driver. As I made contact with the driver I could detect a strong odor of intoxicants on his breath and his eyes were glassy and bloodshot. He produced a valid Missouri driver license that identified him as Tyler G. McNeely. I asked McNeely where he was coming from and if he had been drinking alcoholic

beverages. He stated that he was coming from Slingers Bar and that he had drunk a couple of beers. I asked McNeely to step from his vehicle. He was unstable on his feet and swayed while maintaining his balance.

I administered four field sobriety tests to McNeely. He did poorly on the tests. McNeely refused to give a breath sample into a portable breath tester. At this point I placed McNeely under arrest for Driving While Intoxicated at 0218 hours. I began to transport McNeely to the Cape Girardeau County Jail to administer a breath test. McNeely indicated that he would refuse to take a breath test. I transported McNeely to the St. Francis Medical Center Lab to obtain a blood sample.

At 0233 hours, I read McNeely the Missouri Implied Consent and asked that he provide a blood sample. He refused to voluntarily submit to the blood withdrawal. I informed him that, pursuant to Missouri law, that I was going to obtain the blood sample against his refusal. At 0235 hours, Lab Technician Pam Hamilton withdrew the blood sample from McNeely's right arm. I took immediate possession of the sample. I transported McNeely to the Cape Girardeau County Jail.

At 0255 hours, I again read McNeely the Missouri Implied Consent and asked that he submit to a breath test. He refused to take the breath test. McNeely has two prior alcohol related convictions from Cape Girardeau County with both coming in

2007. The blood sample will be sent to the MSHP Crime Lab for analysis.

****

3. *For the issuance of a warrant in a misdemeanor case, also complete the following:*

a) I believe the defendant would not appear in court in response to a criminal summons because: ___; or

b) I believe that the defendant poses

(1) A danger to a crime victim because ___; or

(2) A danger to the community or to any other person because ___

M A Winder	M A Winder
Print	Signature
Missouri State Highway Patrol	Missouri State Highway Patrol

IN THE CIRCUIT COURT OF
CAPE GIRARDEAU COUNTY, MISSOURI

STATE OF MISSOURI	)	
	)	
Plaintiff,	)	Case No.
v.	)	10CG-CR01849-01
TYLER G. MCNEELY	)	
	)	
[Address Omitted In Printing]	)	
White Male DOB:	)	
[Omitted In Printing]	)	
SSN: [Omitted In Printing]	)	PA File No.
SID: [Omitted In Printing]	)	03105001
FBI: [Omitted In Printing]	)	
OCN: [Omitted In Printing]	)	
Defendant.	)	

INFORMATION IN A FELONY CASE

(Filed Dec. 6, 2010)

The Prosecuting Attorney of County Cape Girardeau, State of Missouri, charges that the defendant either acting alone or knowingly in concert with another, in violation of Section 577.010, committed the class D felony of driving while intoxicated, punishable upon conviction under Sections 558.011, 560.011, and 577.023, RSMo, in that On or about October 3, 2010, at U.S. 61, in the County of Cape Girardeau, State of Missouri, the defendant operated a motor vehicle while under the influence of alcohol, and

On or about March 25, 2008, defendant had pleaded guilty to or had been found guilty of driving with excessive blood alcohol content, for events occurring

on November 11, 2007, in the Associate Division of the Circuit Court of Cape Girardeau County, Missouri, and

On or about October 3, 2007, defendant had pleaded guilty to or had been found guilty of driving while intoxicated, for events occurring on June 23, 2007, in the Associate Division of the Circuit Court of Cape Girardeau County, Missouri.

CHARGE CODE: 4741004.0

WITNESSES:

Chemist, SEMO Crime Lab, Missouri State Highway Patrol, Cape Girardeau, MO 63701
Pam Hamilton, 211 St. Francis Drive, Cape Girardeau, MO 63701
Mark A. Winder, Missouri State Highway Patrol, Jackson, MO 63755

PUNISHMENT:

One day to one year imprisonment in the county jail, or one to four years imprisonment in a state correctional facility, or a fine not exceeding five thousand dollars, or by both such imprisonment and fine.

/s/ Mike Mueth
Assistant Prosecuting Attorney

Michael G. Mueth, Jr., Assistant Prosecuting Attorney of the County of Cape Girardeau, State of Missouri, being duly sworn upon oath, state the facts

stated in the above information are true according to his/her best information, knowledge, and belief.

/s/ Mike Mueth
Assistant Prosecuting Attorney

Sworn and subscribed to before me this 6th day of December, 2010.

CLERK OF COURT

[SEAL] BY: /s/ Charleen Biester, DC

IN THE CIRCUIT COURT OF
CAPE GIRARDEAU COUNTY, MISSOURI

STATE OF MISSOURI,	)	
Plaintiff,	)	
	)	Case No.
v.	)	10CG-CR01849
TYLER G. MCNEELY,	)	
Defendant.	)	

MOTION TO SUPPRESS EVIDENCE

(Filed Dec. 23, 2010)

Comes now defendant, Tyler G. McNeely, by his attorney of record, Stephen C. Wilson, and hereby moves the court to suppress from evidence in this cause the sample of blood taken from the defendant at St. Francis Medical Center on October 3, 2010. Said blood sample was taken without the consent of the defendant, without the benefit of first seeking a search warrant, and was not justified by any exception to the search warrant requirement. The taking of blood under these circumstances violated defendant's rights under the Fourth Amendment to the United States Constitution, and his rights against unreasonable search and seizure under the Article I, Section 15 of the Missouri Constitution.

WHEREFORE, defendant prays the court enter its order suppressing from evidence in this cause the blood drawn from the defendant as set forth hereinabove.

WILSON & MANN L.C.

By: /s/ Stephen C. Wilson
Stephen C. Wilson #30603
2907 Independence, Ste. C
P.O. Box 512
Cape Girardeau, MO 63702-0512
(573) 651-1950
(573) 651-3611 – Facsimile
ATTORNEYS FOR DEFENDANT

[Certificate Of Service Omitted In Printing]

IN THE 32ND JUDICIAL CIRCUIT COURT
CAPE GIRARDEAU COUNTY
HONORABLE BENJAMIN F. LEWIS, JUDGE,
DIVISION II

STATE OF MISSOURI,	)	
Plaintiff,	)	
	)	Case No. 10CG-CR01849-01
TYLER G. McNEELY,	)	
Defendant.	)	

TRANSCRIPT OF MOTION
TO SUPPRESS HEARING

JANUARY 14, 2011

FOR THE STATE:
MR. JACK KOESTER
Assistant Prosecuting Attorney
Jackson, Missouri

FOR THE DEFENDANT:
MR. STEPHEN C. WILSON
2907 Independence
Cape Girardeau, Missouri

[2] **PROCEEDINGS OF JANUARY 14, 2011**

On Friday, the 14th day of January, 2011, the above-entitled and numbered case came on regularly for a motion to suppress hearing in the 32nd Judicial Circuit Court, Cape Girardeau County, Jackson, Missouri, before the HONORABLE BENJAMIN F. LEWIS, Judge, Division II.

The Plaintiff was represented by MR. JACK KOESTER, Assistant Prosecuting Attorney, Jackson, Missouri.

The Defendant was present in person and was represented by MR. STEPHEN C. WILSON, 2907 Independence, Cape Girardeau, Missouri.

The following proceedings were had and entered on the record:

THE COURT: For the record, the Court calls the case of State of Missouri versus Tyler G. McNeely, Case Number 10CG-CR01849-01. The State appears by Assistant Prosecuting Attorney Jack Koester. The defendant Tyler G. McNeely appears in person and by his attorney Stephen Wilson. The matter comes on for hearing on the defendant's motion to suppress.

Mr. Koester, would you call your first witness, please?

MR. KOESTER: State calls Mark Winder.

[3] **MARK WINDER**,

having been first duly sworn by the clerk, testified as follows:

THE COURT: Mr. Koester.

DIRECT EXAMINATION

QUESTIONS BY MR. KOESTER:

Q Will you state your name for the record?

A Mark Winder.

Q And how are you employed?

A I'm a corporal with the Missouri State Highway Patrol.

Q How long have you been with the Missouri State Highway Patrol?

A 17 and a half years.

Q Corporal, I'd like to direct your attention to the early morning hours of October 3rd of 2010. Were you on routine patrol at about 2:00 a.m. on that date?

A Yes.

Q And where were you patrolling?

A It was on Kingshighway just north of Missouri 74 in Cape city.

Q And shortly after 2:00 a.m. did you observe a Ford F-150?

A Yes.

Q And what drew your attention to this particular [4] vehicle?

A I was traveling north on Kingshighway-61 and the vehicle was traveling south on 61. It's a posted 45 mile per hour speed limit and the vehicle appeared to be traveling well in excess of 45.

Q And did you have a radar unit?

A Yes.

Q And were you able to register the speed of that truck?

A Yes.

Q And did you confirm that it was speeding?

A Yes.

Q And how fast was it traveling?

A 56.

Q And after registering the speed what did you do?

A I made a U-turn and began to overtake the truck.

Q And were you able to make a traffic stop on that truck?

A Yes.

Q And how many occupants were there in the truck?

A Just one.

Q And was it this defendant Tyler McNeely behind the wheel?

A It was Mr. McNeely, yes, with the brown sweatshirt.

[5] Q And can you explain for the Judge when you initially made contact with Mr. McNeely what did you observe?

A There was a really strong odor of intoxicants, his eyes were glassy and bloodshot, slurred speech.

Q And as a result of those initial observations, did you ask him to step out of the truck?

A Yes.

Q And did you have him perform some standard field sobriety tests?

A Yes.

Q And if you recall, which standard field sobriety tests were administered?

A I had him recite the alphabet, did the horizontal gaze nystagmus in my vehicle. We step out of the vehicle. I do the walk and turn and one leg stand.

Q In that order?

A Actually the one leg stand then the walk and turn.

Q And how did he do on reciting the alphabet?

A He was unable to complete the alphabet correctly.

Q Do you remember specifically?

A I don't have it specifically.

Q You said you administered the horizontal gaze nystagmus test?

[6] A Yes.

Q You're trained to administer that test?

A Yes.

Q And how many clues of impairment did this defendant exhibit on that particular test?

A He exhibited six out of six possible.

Q All six clues?

A Yes.

Q And then you said you had him perform the one leg stand test?

A Yes.

Q And how did he perform on the one leg stand?

A Very poorly. He put his foot down. He swayed. Actually I have that he could not perform the test which means he put his foot down three times or more.

Q And then you had him perform the walk and turn test?

A Yes.

Q And how did he perform on that test?

A Again poorly. He missed his heel to toe, he used his arms for balance and he lost his balance while making his turn.

Q After the standard field sobriety tests, did you ask him to submit a sample into the portable breath testing device?

[7] A Yes.

Q And did he agree to do so?

A No, he did not.

Q And based upon all of your observations there at the scene, did you form the opinion that he was intoxicated?

A Yes.

Q Did you place him under arrest at that time?

A Yes.

Q And what happened after you placed him under arrest?

A I just had the feeling since he would not take the portable breath test, you kind of get a feeling that he's not going to take a breath test so I asked him in the car that once we got to the sheriff's department would he submit to a breath test.

Q And what did this defendant say?

A He said he would not take one.

Q He said he would not submit to a breath test?

A Right.

Q And what did you do after he told you that?

A So I transported him, instead of the jail, I went to St. Francis lab.

Q And what happened when you arrived at St. Francis?

[8] A We walk in the outpatient area. The lab is right there. Walked to the lab. There's a lab technician there. I then read him implied consent off my computer and asked him for a blood sample.

MR. KOESTER: May I approach the witness, Your Honor?

THE COURT: You may.

Q (By Mr. Koester) Let me show you what I've marked as State's Exhibit 1 and do you recognize State's Exhibit 1?

A Yes.

Q That's the implied consent form. This is on the alcohol influence report form?

A Yes.

Q And is this what you would have read to Mr. McNeely?

A Yes.

Q And can you read into the record exactly what you would have asked him?

A Number one is you're under arrest and I have reasonable grounds to believe you were driving a

motor vehicle while you were in an intoxicated or drugged condition. Number two, to determine the alcohol content of your blood, I request you submit to a chemical test of your blood. Three, if you refuse to take the test, your [9] driver's license shall immediately be revoked for one year. Four, evidence of your refusal to take the test may be used against you in prosecution in a court of law. Five, having been informed of a reason for request of the test, will you take the test?

Q And after reading him the Missouri Implied Consent law, what did this defendant say?

A He would not submit to a blood withdrawal.

Q And after he refused to submit to the blood withdrawal, what did you do?

A Pursuant to some changes that we've had in our – those statutes, I instructed the lab technician to draw the blood.

Q And was a blood sample in fact taken?

A Yes.

Q Now, after the blood sample was taken, did you reread the Missouri Implied. Consent law?

A After the blood sample was taken, I transported him to Cape Girardeau County Jail for incarceration and I reread him the implied consent and asked him one more time to take a breath test.

Q A breath test at this time?

A Yes.

Q You read him the exact same questions?

A Yes.

[10] Q And once again did he refuse?

A Yes.

Q And on State's Exhibit Number 1, you have recorded some times. It says 0233. Would that have been the first time you read the –

A That was the time for the blood at the hospital.

Q And then it says 0255.

A That was at the jail for the breath test.

Q When you asked him for the breath test?

A Yes.

Q Did you seize the blood sample that was taken on October 3rd?

A Yes.

Q And let me show you what's been marked as State's Exhibit 2. Do you recognize State's Exhibit 2?

A This is the lab report that I received from our Troop E Missouri crime lab.

Q And this corresponds with the sample that you seized on October 3rd?

A Yes.

Q And it shows the blood alcohol content to be .154?

A Yes.

Q Thank you.

MR. KOESTER: Your Honor, for purposes of this [11] hearing I would move to submit State's Exhibits 1 and 2.

THE COURT: Any objection?

MR. WILSON: No objection, Judge.

THE COURT: Received.

MR. KOESTER: I have no further questions for the trooper.

THE COURT: Mr. Wilson.

MR. WILSON: Thank you, Judge.

CROSS EXAMINATION

QUESTIONS BY MR. WILSON:

Q Trooper Winder, you have your report there in front of you, don't you?

A Yes.

Q Feel free to refer to it while I'm asking you questions.

A Okay.

Q Specifically on time, you had an initial contact with Mr. McNeely at 2:08, is that correct?

A Yes.

Q And when you're preparing a report, initial contact, does that mean when you first see his vehicle or when you first encounter him after you stop him and you walk up to his vehicle or is there a standard rule?

A I don't know if there's a standard rule. I mean that's kind of once I've made contact with him and I kind [12] of look at my watch and estimate one or two minutes so it's about the time I see his vehicle, yes.

Q All right. Another time that is in your report is 0218 as time of arrest/custody?

A Yes.

Q Is that based upon when you radio Poplar Bluff and say someone is in custody or is that a watch reference when you look at your own watch?

A That's a watch reference after I have placed him under arrest.

Q And then so those two times you're out there on the side of South Kingshighway, correct?

A Yes.

Q And then the next time that I think we've got is 0233 which is when you read the implied consent

rights set out in Exhibit 1 you just identified and that was at St. Francis Hospital?

A Yes.

Q And then the next time is 0255 you again read the implied consent rights and at that point you're at the Cape County Sheriff's Department?

A Yes.

Q In preparation for today's hearing, have you reviewed the video from your patrol car?

A I have not, no.

[13] Q All right. Based upon your recollection, was there some effort made to contact the prosecuting attorney to obtain a warrant to have blood drawn?

A No.

Q Was that a conscious decision that you made that you would not do that?

A It was a conscious decision based on the fact that due to the law changes and what I had been told it was not necessary.

Q Okay. When you say what you've been told, are you talking about in the form of a directive from the Missouri State Highway Patrol?

A Well, we had some new laws training. I also have regular contact with Susan Glass from the Missouri Attorney General's office and she wrote an opinion piece that her opinion was that with the

changes in the law, that the warrant was not necessary.

Q Is that the article that was published in *Traffic Safety News*, September of 2010?

A Yes.

Q And she's with the Missouri Attorney General's office?

A Yes.

Q Was there any particular exigent circumstance as you understand that from your training or emergency [14] circumstance that dictated the need to immediately get blood from Mr. McNeely?

A Exigent, no.

Q Okay. If I recall right from watching your video, you were on South Kingshighway at a location that was north of where you can loop around and head up northbound I-55. Does that sound correct?

A Yes, we were just south of Southern Expressway.

Q All right. And then once you placed Mr. McNeely under arrest at 2:18, you drove south for a distance and then got onto the entrance ramp for I-55 and drove north on I-55 to the Route K exit?

A Yes.

Q And then went to St. Francis Hospital?

A Yes.

Q And throughout that time there was no effort that was made to contact the prosecuting attorney to determine whether or not they could get a warrant to draw this blood?

A No.

Q On that night were you aware that or were you aware whether or not there was a prosecuting attorney on call?

A I'm sure there was.

Q Okay. In your time as a highway patrolman, have [15] you obtained search warrants to obtain blood from people that have been arrested for driving while intoxicated?

A Yes.

Q And it's correct, is it not, that there's basically a form that the prosecutor of this county has prepared for use by officers to fill out for an affidavit?

A Yes.

Q Have you filled those out before?

A Yes.

Q Let me show you what we've got marked as Defendant's Exhibit B. Is that the type of form that you're familiar with?

A Yes.

Q And are those available to you at the sheriff's department?

A Yes, they're readily available.

Q In the 17 and a half years that you've been a highway patrolman, do you have an estimate for us of the number of times that you've had to obtain a search warrant to get blood from a person arrested for driving while intoxicated?

A Probably less than ten.

Q On any of the times in your training or in your experience when you have wanted to get a search warrant, have you been unable to because of the unavailability of a [16] prosecuting attorney?

A No.

Q Have you ever been unable to because of the unavailability of a judge?

A No.

Q On this particular night, did you have any reason to believe that you couldn't have gotten a search warrant because of the unavailability of a prosecutor or the unavailability of a judge?

A No.

MR. WILSON: That's all, Judge.

THE COURT: Mr. Koester?

MR. KOESTER: No redirect, Your Honor.

THE COURT: You can step down. Thank you.

(Witness excused.)

THE COURT: Call your next witness.

MR. KOESTER: The State rests.

THE COURT: State's rested. Will there be evidence for the defense?

MR. WILSON: Yes, Judge.

THE COURT: Call your first witness.

MR. WILSON: Judge, first of all, I would – want to put the video into evidence?

MR. KOESTER: Sure.

MR. WILSON: Judge, I'd offer as Defendant's [17] Exhibit A I think by agreement a video recording from Trooper Winder's vehicle in case the Court wants to review the video.

THE COURT: Any objection?

MR. KOESTER: No, Your Honor.

THE COURT: I'll receive the disc in evidence. You've seen it, right?

MR. WILSON: Yes.

THE COURT: Is there any substantial variation between Mr. Winder's account of what happened and what appears on the video?

MR. WILSON: No, Judge, there's not.

THE COURT: Okay.

MR. WILSON: Just for the record, I want it available.

I would also offer Exhibit B which is the application package for blood draws, search warrants for blood draws.

THE COURT: Any objection?

MR. KOESTER: No objection.

THE COURT: Received.

MR. WILSON: Finally, Judge, I have Exhibit C which is a compilation of six recent Cape Girardeau County search warrant cases taken from the files of the court that's with the reference file numbers for each of the six [18] cases. They go back to August of this year. I just ask the Court to take judicial notice of those files that are in this Court.

THE COURT: Any objection?

MR. KOESTER: No, Your Honor.

THE COURT: C is received.

MR. WILSON: Last, Judge, I'd call Blaine Adams.

BLAINE ADAMS,

having been first duly sworn by the clerk, testified as follows:

THE COURT: Mr. Wilson.

DIRECT EXAMINATION

QUESTIONS BY MR. WILSON:

Q State your name, please.

A Blaine Adams.

Q And you're a sergeant with the Missouri State Highway Patrol?

A That's correct.

Q How long have you been with the highway patrol?

A 23 years.

Q You've had extensive training in investigating and handling driving while intoxicated charges?

A Yes.

Q I want to – particularly you are the Type II permit holder for this county or maybe even other areas?

[19] A Corporal Winder and myself both are, yes.

Q All right. Trooper Adams, based upon your training and experience, that also includes, does it not, administering the horizontal gaze nystagmus?

A Yes.

Q And based upon your training, when an individual is subjected to horizontal gaze nystagmus testing and the test is properly administered and properly scored and they have more than six or they have six clues, three in each eye, based upon your training and your knowledge of how that test was developed, does that give you some idea as to what their likely blood alcohol level is?

A We're not allowed really to score it that way. It's just we determine if we think they're intoxicated or not.

Q We're not in front of a jury today.

A I understand.

Q Based upon your training and your knowledge from the studies that were done –

A You're asking about the angle onset and things like that?

Q Well, when you have six clues in the testing which led to the acceptance of horizontal gaze nystagmus as being something to use –

A I think I know what you're asking now.

[20] Q – does it give you an indication of what the likelihood of the blood alcohol level is if it's properly administered and there are six clues?

A Well, the studies show that if they have four or more clues, there's a 91 percent probability that they will have a blood alcohol content of .08 or greater.

Q .08 or .01.

A .08.

Q Or .10.

A .08. This is a newer study than probably the one you're talking about.

Q Okay. Was there a lower probability that it would be over .10?

A Yes, obviously I mean you got a lower limit, you're going to have a higher percentage over that limit.

Q All right. And in your training through your work with the highway patrol, is there a generally accepted rate at which blood alcohol will go down once all of the alcohol has been absorbed out of the stomach?

A It's going to be anywhere from usually a .015 to a .020 per hour.

Q And does that number have a common name or what's that called?

A Well, it's the elimination rate.

Q And that's generally accepted that the blood [21] alcohol will diminish at that rate?

A Yes, and usually from the blood samples I've taken it usually falls right in that range.

Q All right. Now, would you agree that the rate of elimination can't start – strike that.

Would you agree that the blood alcohol level probably isn't going to peak until all the alcohol in the stomach has been absorbed?

A I would say, yes, but the thing with the elimination rate, usually people start – 90 to 95 percent of people, their blood alcohol, they will peak out before they even leave the bar.

Q Okay. Now, you are the zone sergeant here in this area?

A I am one of two zone sergeants. We have what's referred to as split zones. I supervise Zone 5.

Q All right. Has there been any directive – and you were served a subpoena to bring any such directives. Has there been any directives issued by the highway patrol by Troop E so far as what procedures officers are to follow when they arrest someone who refuses to submit to a chemical test and whether or not they're to obtain a search warrant for blood?

A I have an interoffice communication here that was sent out by Major Johnson and it said it is

suggested [22] after detailed legal review this only be used in exigent circumstances, then only on manslaughter/vehicular assault cases with serious physical injury, serious physical or disabling injuries after expending all reasonable means to obtain a search warrant, but then it goes on to also say it is recommended zone sergeants plan a meeting with their prosecutor to discuss the change and determine the course of action to be followed in their assigned area preferably prior to the effective date of the change of this law and we did that.

Q And the effective date of the law you're talking about, was that the changes to RSMo Section 577.041, the implied consent statute?

A Yes, where they removed the wording no test shall be given which went into effect August 28th.

Q And did you bring a copy of that?

A Just read off of it.

Q Can we make this an exhibit?

A If you would like to, yes. You have my permission.

(Defendant's Exhibit D was marked for identification.)

Q (By Mr. Wilson) Let me hand you what we have now marked as Exhibit D. That is an interoffice communication. You said it's from Major Johnson?

[23] A Yes.

Q What is his position with the patrol?

A He's the major over the field operations bureau. You have the colonel and then you have five majors – I'm sorry. You have the colonel, lieutenant colonel and five majors.

Q That was sent to the troop commanders and then disseminated down to the various zone offices?

A Yes, this came out more recently, but this referred back to what they sent out earlier and again it said that it was recommended that you meet with your local prosecutor prior to change in the law.

Q And that's dated December 27 of 2010?

A Yes.

Q And was there such a meeting for this zone?

A Yes, I don't remember if I met with Morley in person, but I spoke with Morley and I believe it was in person.

Q Was there some decision made as to how to respond to this change in the law you're talking about?

A Yes, what it is if it's a standard DWI arrest or if it's a motor vehicle accident with no injuries and they refuse to go ahead and draw their blood. Morley said if it was a vehicle accident with injuries, he would prefer to get a search warrant and I suggested, well, in that [24] case could we go ahead and draw

the blood and get the warrant and he said that would be fine.

Q That memo mentions exigent circumstances. Is there some standard frame of reference that the highway patrol has as to what constitutes exigent circumstances for a situation like this?

A Well, on this it's talking about injuries, however, I hate to disagree with Corporal Winder, but in any DWI arrest is exigent circumstances because you have evidence being destroyed with each passing minute. It's different than any other type of arrest.

Q It's actually more accurate to characterize it as evidence possibly dissipating or being eliminated from the body. It's not being destroyed?

A Well, you're losing evidence.

Q Which is the elimination rate we talked about a few moments ago?

A Yes, and I have some examples up here if you would like them of the rate of elimination.

MR. WILSON: Judge, I would offer into evidence Exhibit D.

THE COURT: Any objection?

MR. KOESTER: No objection, Your Honor.

THE COURT: D is received.

MR. WILSON: And I have no other questions of the [25] witness.

THE COURT: Mr. Koester?

MR. KOESTER: I have a few questions.

CROSS EXAMINATION

QUESTIONS BY MR. KOESTER:

Q Sergeant Adams, I want to refer your attention to Defendant's Exhibit C. These are some recent search warrant cases and as you can see it's been outlined that Mr. Wilson has prepared the time that the vehicle would be pulled over and the time the search warrant would have been issued, but it doesn't say when the blood would have actually been drawn.

A Correct.

Q You've actually applied for search warrants in DWI cases on numerous occasions, isn't that correct?

A That's correct.

Q Now, the Missouri State Highway Patrol zone office in this area is located in the Cape Girardeau County Sheriff's Department building, correct?

A That's correct.

Q And that's located in Jackson?

A Yes, it is.

Q And two hospitals in Cape Girardeau County, Southeast Missouri Hospital and St. Francis Hospital, those are both located in Cape Girardeau, correct?

[26] A That's correct.

Q Can you give us an approximate time it takes to drive from Jackson to one of the hospitals?

A I would say 15 minutes.

Q Now, has it been your practice in the past to meet with a prosecutor on call at the sheriff's department building in Jackson?

A I've done it both ways. I've met them at the hospital. I've met them at Cape PD. I think I met Mike Mueth on the last one we did, I think I met him at the sheriff's office.

Q And so if you're actually applying for a search warrant at the sheriff's department, do you wait for the faxed copy of the search warrant to come through at the sheriff's department in Jackson?

A I usually meet with the prosecutor. I actually go over what I have, the facts I have and they may make suggestions of things we might need to add to the affidavit before we apply for the warrant.

Q And so in your estimation based upon your experience, how much extra time does it add in a typical DWI case when you're applying for a search warrant?

A The time like in this case where he just drew the blood or where I get a warrant?

Q Yes.

[27] A Usually at least two hours.

Q About two hours?

A Yes.

Q So just so the record is clear, you're differentiating between a situation where if you could arrest someone for driving while intoxicated and take them to the hospital and draw blood without the necessity of a search warrant as opposed to a situation where you have to apply for a search warrant to obtain the blood?

A Yes, an hour and a half to two hours is what I would say.

MR. KOESTER: Thank you. I don't have any further questions.

THE COURT: Mr. Wilson?

MR. WILSON: No other questions, Judge. Thank you.

THE COURT: Okay. Let me see if I understand this correctly. You're the Troop E supervisor?

THE WITNESS: I'm Troop E, Zone 5 supervisor.

THE COURT: The memo that you have from the highway patrol –

THE WITNESS: Okay. That's from a major in Jefferson City.

THE COURT: – says that if you pull somebody over for a suspected DWI, you can take them in and tell [28] the hospital to go ahead and draw the blood without consent in what circumstance?

THE WITNESS: Well, this is just – he's just going off what some attorneys have told them.

THE COURT: But what does he say, you do it when there's a wreck or you do it when there's not a wreck?

THE WITNESS: He's saying that – his exact wording on this memo is it is suggested after detailed legal review this only be used in exigent circumstances and then only manslaughter/vehicular assault cases with serious physical or disabling injuries.

THE COURT: So what he's saying is there's a terrible wreck, you suspect the defendant is intoxicated. That would be the situation where you would go ahead and get the blood without the warrant, correct?

THE WITNESS: That's what they're saying, but then like I said, it goes on the next sentence to say it is recommended zone sergeants plan a meeting with their prosecutor to discuss the change and determine the course of action to be followed in their assigned area.

THE COURT: And then if I understood correctly, Morley – when I say Morley, Mr. Swingle, the prosecuting attorney in Cape Girardeau County –

THE WITNESS: Yes.

THE COURT: – that wasn't exactly the way he [29] viewed the statute, correct?

THE WITNESS: No.

THE COURT: He kind of looked at it the other way?

THE WITNESS: Exactly.

THE COURT: That in a run of the mill DWI, that would be the time when you would take them in, but in a big case, a more serious case where there's injury or death, that that would be the case where you would want to be sure to get a search warrant, correct?

THE WITNESS: Because of the change in the law, he didn't want to risk losing a case of vehicular homicide or a vehicular injury case.

THE COURT: I'm just trying to distinguish which kind of case it would be.

THE WITNESS: I understand.

THE COURT: This was, as I understand it, pretty much a run of the mill DWI arrest?

THE WITNESS: Exactly, that's what it was.

THE COURT: One which the highway patrol memo suggests should have a search warrant?

THE WITNESS: Right.

THE COURT: But one which the prosecutor's advice suggests would not?

THE WITNESS: That's right.

[30] THE COURT: It's a run of the mill deal, the statute allows it, let's not wake up the prosecutor and the judge in the middle of the night –

THE WITNESS: Yes.

THE COURT: – if that's what I understood you to say, right?

THE WITNESS: That's correct.

THE COURT: Okay. Now, did that open up anything you want to follow-up on, Mr. Wilson?

MR. WILSON: No, Judge.

THE COURT: Mr. Koester?

MR. KOESTER: No, Your Honor.

THE COURT: You can step down. Thank you.

(Witness excused.)

THE COURT: Further evidence for the defense?

MR. WILSON: No other evidence for the defense, Judge. Did I offer Exhibit D?

THE COURT: You did. It was received.

MR. KOESTER: Exhibits 1 and 2.

THE COURT: Is there anything further?

MR. WILSON: Nothing further, Judge.

THE COURT: Mr. Koester suggested you all might want to brief this. Do you want to brief this?

MR. WILSON: Judge, I'd like to, but I am going to be leaving town this afternoon and will be gone for a [31] week so I can't get anything to you probably for a couple weeks. I've got most of my cases collected, but I wanted to wait and see what the evidence was before I try to put it in a coherent memorandum.

THE COURT: How about if I put this on the February 28th docket for a plea or trial setting and in the meantime you get me your brief by February 14th. That's plenty of time, isn't it?

MR. WILSON: Yes, it is, Judge. Thank you.

THE COURT: Okay.

MR. WILSON: And we're on the February 28 docket?

THE COURT: Right. In the meantime I'll take the matter under advisement pending receipt of the briefs.

MR. WILSON: Thank you, Judge.

THE COURT: We're off the record.

* * *

[32] [Certificate Omitted In Printing]

State's Exhibit 1

FORM DOR-2389	ORI NUMBER MOMHPEE00	REPORT NUMBER 10031000178	PAGE 2

IMPLIED CONSENT TIME ADVISED: 0233 (MIL)

FOR USE IN DWI ARREST ONLY	FOR USE IN ZERO TOLERANCE ONLY	FOR USE IN NON-DWI ARREST FOR FATALITY OR SERIOUS PHYSICAL INJURY ONLY
☒ 1. You are under arrest and	☐ 1. You have been stopped and	☐ 1. You were involved in a

☒ OTHER (ATTACH CHECKLIST OR LAB REPORT)

CERTIFICATION OF EXAMINATION BY OPERATOR

AS SET FORTH IN THE RULES PROMULGATED BY THE DEPARTMENT OF HEALTH RELATED TO THE DETERMINATION OF BLOOD ALCOHOL BY BREATH ANALYSIS, I CERTIFY BY COMPLETING THE BELOW THAT:

1. There was no deviation from the procedure approved by the department.
2. To the best of my knowledge the instrument was functioning properly.
3. I am authorized to operate the instrument.
4. No radio transmission occurred inside the room where and when this test was being conducted.

NAME OF OPERATOR	TROOP OR AGENCY	DEPARTMENT OF HEALTH PERMIT NUMBER	EXPIRATION DATE	BLOOD ALCOHOL CONCENTRATION BY WEIGHT
DATE	MODEL NUMBER	SERIAL NUMBER	INVENTORY NUMBER	**Refusal**

State's Exhibit 1

FORM DOR-2389	ORI NUMBER MOMHPEE00	REPORT NUMBER 10031000178	PAGE 2

IMPLIED CONSENT **TIME ADVISED: 0233 (MIL)**

FOR USE IN DWI ARREST ONLY	FOR USE IN ZERO TOLERANCE ONLY	FOR USE IN NON-DWI ARREST FOR FATALITY OR SERIOUS PHYSICAL INJURY ONLY
☒ 1. You are under arrest and I have reasonable grounds to believe you were driving a motor vehicle while you were in an intoxicated or drugged condition; **OR** . . .	☐ 1. You have been stopped and are under the age of 21. I have reasonable grounds to believe that you were driving a motor vehicle with a blood alcohol content of .020% or more; **OR** . . .	☐ 1. You were involved in a motor vehicle collision which resulted in a ☐ fatality/serious physical injury, or ☐ arrest and ticket for a traffic violation involving serious physical injury or fatality.

☒ 2 To determine the alcohol/drug content of your blood, I am requesting you submit to a chemical test of your ☒ Breath ☒ Blood ☐ Other _____ (Check no more than two)

☒ 3. If you refuse to take the test(s), your driver license will immediately be revoked for one year

☒ 4 Evidence of your refusal to take the test(s) may be used against you in prosecution in a court of law.

☒ 5 Having been informed of the reasons for requesting the test(s), will you take the test(s)?
☐ YES ☒ NO Time: 0233 (MIL) 0255 2nd time

IF SUBJECT REFUSED TEST(S), WAS ATTORNEY REQUESTED PRIOR TO REFUSAL? ☐ YES ☒ NO	TIME SUBJECT ASKED FOR ATTORNEY	NAME OF PERSON PHONED FOR ADVICE

15 MINUTE OBSERVATION PERIOD STARTED AT: **NA** (MIL)

CHECK TYPE OF INSTRUMENT USED AND BOXES FOR EACH STEP (ATTACH MOST RECENT MAINTENANCE REPORT COMPLETED PRIOR TO THIS BREATH TEST) – IF BLOOD TEST, SEE PAGE 4.

☐ INTOXILIZER 5000

☐ 1. Subject observed for at least 15 minutes by ___. No smoking or oral intake of any material during this time; if vomiting occurs, start over with the 15 minute observation period.
☐ 2. Assure that power switch is ON and then press the START TEST button.
☐ 3. Enter test record card.
☐ 4. Enter subject and officer information.
☐ 5. When display reads PLEASE BLOW, insert mouthpiece and take the subject's breath sample.
☐ 6. When test record is printed, remove test record and attach printout to this report.

☐ DATAMASTER

☐ 1. Subject observed for at least 15 minutes by ___. No smoking or oral intake of any material during this time; if vomiting occurs, start over with the 15 minute observation period.
☐ 2. Assure that power switch is ON.
☐ 3. Press RUN button.
☐ 4. When display requests INSERT TICKET, insert evidence ticket.
☐ 5. Enter subject and officer information.
☐ 6. When display reads PLEASE BLOW and gives audible beep, take subject's breath sample.
☐ 7. When printer has completed printing out test result, remove ticket from printer. Attach printout to this report.

TEST DATE	TEST TIME	BAC CONTENT	TEST DATE	TEST TIME	BAC CONTENT
					Refusal

☒ OTHER (ATTACH CHECKLIST OR LAB REPORT)

CERTIFICATION OF EXAMINATION BY OPERATOR

AS SET FORTH IN THE RULES PROMULGATED BY THE DEPARTMENT OF HEALTH RELATED TO THE DETERMINATION OF BLOOD ALCOHOL BY BREATH ANALYSIS, I CERTIFY BY COMPLETING THE BELOW THAT:

1. There was no deviation from the procedure approved by the department.
2. To the best of my knowledge the instrument was functioning properly.
3. I am authorized to operate the instrument.
4. No radio transmission occurred inside the room where and when this test was being conducted.

NAME OF OPERATOR	TROOP OR AGENCY	DEPARTMENT OF HEALTH PERMIT NUMBER	EXPIRATION DATE	BLOOD ALCOHOL CONCENTRATION BY WEIGHT
				Refusal

DATE	MODEL NUMBER	SERIAL NUMBER	INVENTORY NUMBER

STATE'S EXHIBIT 2

Lab Number: 0322230

Missouri State Highway Pat
Crime Laboratory Division
An ASCLD/LAB Accredited Laboratory

[LOGO] [SEAL]

E Lab Toxicology
Certified Report

Agency:	Troop E
Incident:	33 – Liquor Laws
Investigating Officer:	MARK WINDER
Subjects Involved:	Mcneely, Tyler G – Suspect
Lab Number:	0322230
Agency Case #:	10031000178
Date of Incident:	10/03/2010
County of Incident:	Cape Girardeau

Item 1.0979.001 blood

Volatiles by gas chromatography:
ethyl alcohol 0.154%

I, the undersigned, performed the analyses described in this report.

This report may contain opinions and interpretations of the undersigned. I, the undersigned, do hereby certify that the above and foregoing is a true and accurate summation of the results of analyses conducted.

Criminalist	Date of Report
Emily Smelser	10/27/2010

/s/ Emily M Smelser

DHSS Type 1 Permit #101015 Expires 08/30/2012

DEFENDANT'S EXHIBIT B

IN THE CIRCUIT COURT OF
CAPE GIRARDEAU COUNTY, MISSOURI

STATE OF MISSOURI,)
) SS.
COUNTY OF)
CAPE GIRARDEAU,)

Case No. _____

APPLICATION FOR SEARCH WARRANT

I, John N. Koester, Jr., Assistant Prosecuting Attorney of the County of Cape Girardeau, State of Missouri, being duly sworn, deposes and states upon information and belief that _____, described as follows:

_____

_____

and who was last seen at or around _____, in Cape Girardeau County, and in the custody of local law enforcement, has in their person, and specifically in their blood, evidence of the commission of the crime of Driving While Under the Influence of Alcohol.

The evidence to be searched for consists of samples of blood from the body of said person.

Basis of affiant's information and belief is contained in the attached affidavit of witness of facts concerning the said matter, Officer _____, and said affidavit is attached hereto and incorporated herein by reference and submitted herewith as a

basis upon which this Court may find the existence of probable cause for the issuance of said warrant.

WHEREFORE, complainant prays that a search warrant be issued as provided by law.

OFFICE OF THE PROSECUTING ATTORNEY

By: _____
John N. Koester, Jr. Bar # 52177
Assistant Prosecuting Attorney

Subscribed and sworn to before me this _____ day of March, 2010.

_____
Notary, State of Missouri,
Cape Girardeau County

_____
JUDGE

Time:

_____

IN THE CIRCUIT COURT OF
CAPE GIRARDEAU COUNTY, MISSOURI

STATE OF MISSOURI,)
COUNTY OF) SS. CASE NO. _____
CAPE GIRARDEAU,)

SEARCH WARRANT

THE STATE OF MISSOURI TO ANY PEACE OFFICER IN THE STATE OF MISSOURI:

WHEREAS, an application for a search warrant in writing, duly verified by oath, has been filed with the undersigned Judge of this Court, stating upon information and belief that an unknown quantity of alcohol, which constitutes evidence of the commission of the crime of Driving While Under the Influence of Alcohol, is currently located in the body and blood of a person believed to be named _____, said person is described as follows: _____

_____

_____

_____

This person was last seen at or around _____, in Cape Girardeau County, and in the custody of local law enforcement.

WHEREAS, the Judge of this Court, from the sworn allegations of said complaint and from the supporting written affidavit filed therewith, has found there is probable cause to believe the allegations of

the complaint to be true and probable cause exists for the issuance of a search warrant herein.

NOW, THEREFORE, these are to command you to search the location of the area of _____ in Cape Girardeau County, Missouri where _____ is currently being held in the custody of local law enforcement, and procure a blood sample from the person, under the following conditions:

1. The blood samples shall be taken by a licensed physician, registered nurse or trained medical technician at a hospital, physician's office or comparable medical center unless such medical personnel, in his or her good faith medical judgment, believes such procurement would endanger the life or health of said person;

2. In withdrawing blood for the purpose of determining the alcohol content thereof, only a previously unused and sterile needle and sterile vessel shall be utilized and the withdrawal shall otherwise be in strict accord with accepted medical practices;

3. In withdrawing the blood, two samples will be taken approximately fifteen to thirty minutes apart and each sample shall be taken in accordance with sub-paragraph 1 (above) of this search warrant document.

4. Upon the request of the person who is tested, full information concerning the test or tests taken at the direction of this warrant shall be made available to that person.

Said search shall be made immediately after the issuance of this warrant by day or night, and you may take with you, if need be, the power of your County or City, and, if said above-described person be found by you, that you seize the person and take the person into your possession for said tests/samples, and that within ten days you make a complete and accurate inventory of the items taken by you in the presence of the person from whose possession the same is taken, if that be possible, and by giving to such person a receipt for such items, together with a copy of this warrant, or, by leaving said receipt and a copy with the property of the person, and that you thereafter return the items so taken and seized by you, together with a duly verified copy of the inventory thereof, and make a return of this warrant to this Court to be dealt with in accordance with the law.

Witness my hand and the seal of this Court on this _____ day of March, 2010.

_____

JUDGE

TIME:

_____

IN THE CIRCUIT COURT OF
CAPE GIRARDEAU COUNTY, MISSOURI

STATE OF MISSOURI,)
) SS.
COUNTY OF)
CAPE GIRARDEAU)

CASE NO. _____

AFFIDAVIT

I, _____, upon my oath, being duly sworn, state as follows:

1. I am a law enforcement officer employed by _____. I have been a law enforcement officer for approximately _____ years.

2. In my career I have worked approximately _____ cases involving the offense of driving while intoxicated and/or related offenses.

3. The blood in the person of _____ constitutes the evidence of the commission of a crime. That individual is described as follows:

_____

_____

_____

4. I have probable cause to believe the blood samples to be seized constitutes evidence of the crime of Driving While Under the Influence of Alcohol and/or Drugs. That evidence is located within the described person and my probable cause is based on the following:

a. Affiant is one of the officers involved in the investigation of offenses which occurred on or about March 22, 2010, in the County of Cape Girardeau, State of Missouri, at approximately _____ am/pm. Those offenses are as follows: Driving While Under the Influence of Alcohol and/or Drugs.

b. I have established probable cause to believe that _____ was the driver of a motor vehicle and was operating said motor vehicle in an intoxicated and/or drugged condition, and this probable cause was established by my personal observations and/or statements of witnesses as follows: _____

_____

_____

_____

_____

_____

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_____

_____

_____

_____.

c. When subject was asked to submit a breath sample to determine the alcohol content of their body, the subject refused.

d. Observations as to the state of intoxication of the suspect were made as recently as the following time: _____ am/pm.

e. When last seen, the suspect, _____ was located at or near _____ in Cape Girardeau County, Missouri, in the custody of law enforcement officers.

5. For all of the above reasons, I have probable cause to believe that the blood of the suspect contains an unknown quantity of alcohol and/or drugs which constitute evidence of the commission of the above-described crimes.

I have read this affidavit and the facts herein are true and correct to the best of my knowledge and belief.

_____

Officer

Subscribed and sworn to before me this _____ day of March, 2010.

_____

Notary, State of Missouri,
Cape Girardeau County

_____

JUDGE

TIME:

_____

DEFENDANT'S EXHIBIT C

RECENT CAPE COUNTY SEARCH WARRANTS FOR BLOOD

10CG-MC00684	**Timmy Kluesner**	December 4, 2010 Operation of vehicle 1614 hours Observation time 1715 hours Warrant issued 1745 hours
10CG-MC00615	**James A. Coates**	November 10, 2010 Observed driving 1600 hours Application signed 1640 hours Warrant issued 1640 hours
10CG-MC00590	**Evan McManaman**	November 4, 2010 Operation 2330 hours Observation time 0112 hours Warrant issued 0124 hours
10CG-MC00549	**Sean Magee**	October 28, 2010 Operation 0133 hours Observation at time of application 0230 hrs Warrant issued 0330 hours
10CG-MC00536	**Rhonda Whitworth**	October 17, 2010 Operation 2350 hours Observation and application 0113 hours Warrant issued 0130 hours
10CJ-MC00075	**Robert Winschel**	August 26, 2010 Occurrence and operation 2146 hours Recent observation 2315 hours Warrant issued 2335 hours

DEFENDANT'S EXHIBIT D

INTER – OFFICE COMMUNICATION

To: Troop Commanders From: Major J. B. Johnson

Subject: Survey of Zone Policies Regarding Blood Draws
Date: 12/27/2010

Information contained below was sent to each Troop Commander on an IOC dated August 18, 2010, outlining the changes to RSMo 577.041. Please survey each zone supervisor and report what the current policy is regarding refusals and blood draws for each county in your respective troop. Information should be listed by county and forwarded to Jenny Becker in the Field Operations Bureau by **January 7, 2011**. Any questions should be directed to Captain Greg Smith or Lieutenant Paul Kerperin at 573-526-6118.

PREVIOUS IOC:

There have been several questions posed concerning the recent change in the Driving While Intoxicated statute (577.041 RSMo). More specifically, officers have asked about removal of the wording that **"no test can be given"** when a person arrested for DWI refuses to submit to a chemical test and how this will affect our procedures. This change was made as defense attorneys were attempting to use this as a defense when officers obtained samples, via a search warrant, following a refusal. With the removal of the wording, officers are again able to obtain the evidence (blood or body fluid), by force if necessary, without first obtaining a search warrant. **It is suggested**

after detailed legal review, this only be used in exigent circumstances and then only on manslaughter/vehicular assault cases with serious physical or disabling injuries, after expending all reasonable means to obtain a search warrant.

It is recommended zone sergeants plan a meeting with their prosecutor to discuss the change and determine the course of action to be followed in their assigned area, preferably prior to the effective date of the change in this law.

GKS:jlb

[SEAL] MISSOURI DEPARTMENT OF REVENUE DRIVER LICENSE BUREAU PO BOX 3700 JEFFERSON CITY MO 65105-3700 **REFUSAL TO SUBMIT TO ALCOHOL/DRUG TEST** **NOTICE OF REVOCATION OF YOUR DRIVING PRIVILEGE** **15 DAY DRIVING PERMIT**	FORM **4323** (REV. 01-2009)	TELEPHONE NUMBER (573) 751-4833	FAX NUMBER (573) 526-3452
		REVOCATION STARTS 15 DAYS FROM DATE NOTICE IS ISSUED	

USE ONLY FOR REFUSAL TO TEST

DRIVER'S NAME LAST FIRST MIDDLE	DRIVER LICENSE NUMBER		DATE NOTICE IS ISSUED
McNEELY TYLER GUY	[Omitted In Printing]		
STREET, RFD, OR BOX	DRIVER LICENSE CLASS	EXPIRATION DATE	
[Home Address Omitted In Printing]	R	12/11/2018	10/03/2010
CITY / STATE / ZIP CODE	ARRESTED/STOPPED PERSON'S SIGNATURE		
JACKSON / MO / 63788			
I ACKNOWLEDGE RECEIPT OF THIS NOTICE FROM THE ARRESTING OFFICER ▶	x Tyler McNeely		

You refused to submit to a test to determine the alcohol and/or drug level of your breath, blood, and/or urine. **Your driving privilege will be revoked for one year**, 15 days from the date of this notice. If you did not give your driver license to the police officer, you must send it to the Driver License Bureau at the address shown above. (Section 577.041, RSMo) **This notice is separate from any traffic tickets you may have received because of this offense. You will be sent an additional notice if you are convicted in court.**

Send the following items to the Driver License Bureau, 301 West High Street, Room 470, PO Box 200, Jefferson City, MO 65105-0200, before your revocation period ends.

- Substance Abuse Traffic Offender Program (SATOP) completion form or a comparable program form. The Division of Alcohol and Drug Abuse will notify us after you complete the program. If you have questions regarding SATOP completion forms or comparable programs, please contact the Division of Alcohol and Drug Abuse at 573-522-4020 or www.dmh.mo.gov/ada/adaindex.htm
- A reinstatement fee in the amount of $45. Payments may be accepted by telephone using the following debit/credit cards: Visa, Mastercard, Discover, and American Express. You may also pay in the form of a cashier's check, money order, or personal check made payable to the Missouri Department of Revenue. Please include your full name, address, date of birth, and driver license number on the payment. The Department of Revenue may electronically resubmit checks returned for insufficient funds.

- Proof of financial responsibility, commonly filed as an SR-22. Contact your local insurance company or agent for information regarding this form. You must file and maintain proof of financial responsibility for two years from the date your license suspension or revocation began. If you do not, your driving privilege will be suspended again for the remainder of the two-year period.
- Proof of installation of an ignition interlock device (IID), if you have had more than one refusal to submit to an alcohol/drug test. The installer of the device will notify us after the installation has been completed. This device must be certified by the Missouri Department of Transportation and installed on any vehicle you operate. You must maintain the device for a period of six months from your reinstatement date. To locate a list of approved ignition interlock devices or installers, visit www.modot.mo.gov/safety/ImpairedDriving.htm or contact the Missouri Department of Transportation at 800-800-2358.

NOTICE: COMMERCIAL DRIVER LICENSE (CDL) HOLDERS

You may additionally be subject to disqualification of your commercial driving privileges due to this action, whether or not you were operating a commercial motor vehicle at the time of this offense (Sections 302.700 and 302.755, RSMo). If you are subject to disqualification, you will be sent a separate notice informing you of the disqualification and your appeal rights (Section 302.311, RSMo).

HOW DO I APPEAL THE REVOCATION OF MY LICENSE?

You have 30 days from the date this notice was issued to file a Petition for Review with the Circuit or Associate Circuit Court. Your petition must be filed in the county where the arrest/stop occurred. (Sections 302.311 and 577.041, RSMo)

WHAT HAPPENS IN COURT WITH YOUR TRAFFIC TICKET HAS NOTHING TO DO WITH THIS HEARING.

TEMPORARY 15 DAY DRIVING PERMIT

This is your permit to drive during the next 15 days only if your Missouri driver license is not expired and is not currently suspended/revoked/denied as a result of a prior incident. You must carry this notice with you while driving.

Valid License Surrendered ☒ YES (Attached to carbon copy for Department of Revenue)
☐ NO

LAW ENFORCEMENT NOTE – Check driver record for the most current information.

This permit is not valid if the driver license is expired, suspended, or revoked or if the person is not licensed to drive in Missouri.

BY ORDER OF THE DIRECTOR OF REVENUE OR HIS/HER DELEGATE

PRINTED NAME OF ARRESTING OFFICER	NAME OF POLICE AGENCY
CPL [Illegible]	MSHP[Illegible]

VISIT OUR WEBSITE AT www.dor.mo.gov

PETITIONER'S BRIEF

RECEIVED
AND
FILED

No. 11-1425

Supreme Court, U.S.
FILED
NOV 9 - 2012
OFFICE OF THE CLERK

In The
Supreme Court of the United States

STATE OF MISSOURI,

Petitioner,

v.

TYLER G. McNEELY,

Respondent.

On Writ Of Certiorari To
The Missouri Supreme Court

BRIEF FOR PETITIONER

JOHN N. KOESTER, JR., *Counsel of Record*
Assistant Prosecuting Attorney

OFFICE OF PROSECUTING ATTORNEY
CAPE GIRARDEAU COUNTY, MISSOURI
H. MORLEY SWINGLE, Prosecuting Attorney

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jnkoester@capecounty.us

Attorneys for Petitioner, State of Missouri

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether a law enforcement officer may obtain a nonconsensual and warrantless blood sample from a drunk driver under the exigent circumstances exception to the Fourth Amendment warrant requirement based upon the natural dissipation of alcohol in the bloodstream.

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OPINIONS BELOW

The opinion of the Missouri Supreme Court is reported as *State v. McNeely*, 358 S.W.3d 65 (Mo. banc 2012), and can be found in the Petition Appendix (hereinafter "Pet. App."), at 1a-22a. The order of the Missouri Supreme Court denying rehearing is not reported. Pet. App. 47a-48a. The opinion of the Missouri Court of Appeals is not reported, but can be found at 2011 WL 2455571 (Mo. App. E.D.). Pet. App., 23a-38a. The judgment of the trial court granting Respondent's motion to suppress evidence can be found in the Petition Appendix. Pet. App. 39a-46a.

JURISDICTION

The Missouri Supreme Court entered the judgment from which relief is sought on January 17, 2012. Pet. App. 1a-22a. The Missouri Supreme Court denied petitioner's motion for rehearing on March 6, 2012. Pet. App. 47a-48a. The petition for a writ of certiorari was filed on May 22, 2012, and certiorari was granted on September 25, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Respondent filed a pretrial motion to suppress evidence, seeking to exclude the results of a blood sample taken after his arrest for driving while intoxicated. J.A. 25-26. The trial court granted the motion to suppress, holding that the blood sample was obtained in violation of Respondent's Fourth Amendment rights. Pet. App. 39a-46a. Petitioner filed an interlocutory appeal. The Missouri Court of Appeals, Eastern District, issued a written opinion that, in its view, the ruling of the trial court should be reversed. Pet. App. 23a-38a. In light of the general importance of the issue, however, the Court of Appeals transferred the case to the Missouri Supreme Court. *Id.* The Missouri Supreme Court affirmed the ruling of the trial court, holding that Respondent's Fourth Amendment rights were violated. Pet. App. 1a-22a.

Petitioner filed a motion for rehearing, which was denied. Pet. App. 47a-48a.

A. Facts

On October 3, 2010, at approximately 2:08 a.m., Corporal Mark Winder of the Missouri State Highway Patrol was on routine patrol in Cape Girardeau County, Missouri, when he noticed a Ford F-150 truck exceeding the posted speed limit. After confirming the speed with a radar unit, Cpl. Winder positioned his patrol car behind the truck and observed it cross the centerline three times. J.A. 19, 29-30. Cpl. Winder then conducted a traffic stop and identified the Respondent, Tyler G. McNeely, as the driver and sole occupant of the truck. J.A. 30. Cpl. Winder immediately noticed that Respondent displayed signs of intoxication, including bloodshot eyes, slurred speech, and a strong odor of alcohol on his breath. J.A. 19, 31. These observations changed the nature of the investigation from a routine traffic stop to a drunk driving investigation. Pet. App. 4a. When Cpl. Winder asked Respondent if he had been drinking, Respondent replied that he was coming from "Slinger's" bar, and that he had consumed "a couple of beers." J.A. 20. Cpl. Winder then asked Respondent to step out of the truck and observed that he was unsteady on his feet. J.A. 20. Cpl. Winder proceeded to administer a series of standard field-sobriety tests, including the horizontal gaze nystagmus test, the one-leg-stand test, and the walk-and-turn test. Respondent performed poorly on all of the tests. J.A. 20, 31-33. Cpl. Winder then

asked Respondent to take a portable breath test, but he refused. J.A. 20, 33. Based upon all of his observations, Cpl. Winder formed the opinion that Respondent was under the influence of alcohol. Respondent was then placed under arrest for driving while intoxicated. J.A. 20, 31-33.

Cpl. Winder secured Respondent in his patrol car and began to transport him to the county jail. While in the patrol car, Cpl. Winder asked Respondent if he would agree to voluntarily provide a breath sample when they arrived at the jail. Respondent told Cpl. Winder that he would refuse to provide a breath sample. J.A. 20, 33-34; Pet. App. 4a-5a, 24a-25a, 39a-40a. Instead of taking Respondent to the jail, Cpl. Winder then decided to drive directly to a nearby hospital in order to obtain a blood sample to secure evidence of intoxication. *Id.* Upon arrival at the hospital, Cpl. Winder read an implied consent advisory form to Respondent and requested a blood sample. J.A. 20, 34-35, 59. Respondent refused to voluntarily consent to the blood test. *Id.* Cpl. Winder then directed a hospital lab technician to draw a blood sample, which was collected as evidence at 2:33 a.m. J.A. 35-36, 59. Cpl. Winder sent the blood sample to the Missouri State Highway Crime Laboratory in order to determine its blood alcohol content. Chemical analysis of the blood sample later revealed that Respondent's blood alcohol content was 0.154 percent, well above the legal limit of .08 percent. J.A. 20, 35-37, 60.

Cpl. Winder did not attempt to obtain a search warrant before directing the hospital lab technician to draw the sample of Respondent's blood.[1] J.A. 39-42; Pet. App. 4a-5a, 40a. Obtaining a search warrant in the middle of the night in Cape Girardeau County involves a delay, on average, of approximately two hours. J.A. 52-54, 70. The rate of elimination of alcohol in the bloodstream is generally somewhere between .015 and .020 percent per hour. J.A. 47-48.

B. Procedural History

1. Cape Girardeau County Circuit Court

Respondent was charged by Information with driving while intoxicated in the Circuit Court of Cape Girardeau County, Missouri, in violation of Mo. Rev.

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[1] Although Cpl. Winder had obtained search warrants in drunk driving cases in the past, he did not attempt to obtain one in this case because he had read an article during a training session that stated a search warrant was no longer necessary due to a recent statutory amendment to the "refusal" provision of the Missouri implied consent law. J.A. 35, 39-40; Pet. App. 4a-5a n.2. Prior to the amendment, the statute provided that if a person refused a chemical test, then "none shall be given." Mo. Rev. Stat. § 577.041.1 (Cum. Supp. 2009). Effective on August 28, 2010, the phrase "none shall be given" was deleted from the statute. § 577.041.1 (Cum. Supp. 2010). Pet. App. 34a-38a, 43a-45a. Based on his understanding of the change to the implied consent law, Cpl. Winder did not seek a warrant. Pet. App. 4a-5a. The Missouri Supreme Court found it unnecessary to address the issue of the statutory amendment because it held the Fourth Amendment was violated. Pet. App. 21a n.9.

Stat. § 577.010 (2010).[2] J.A. 22-24. Respondent filed a pretrial motion to suppress evidence, seeking to exclude the results of the blood sample taken after his arrest. Respondent claimed that the nonconsensual and warrantless blood sample was obtained in violation of his Constitutional right to be free from unreasonable searches and seizures under the Fourth Amendment to the United States Constitution.[3] J.A. 25-26.

The trial court granted Respondent's motion to suppress evidence, holding that the warrantless blood draw violated the Fourth Amendment. Pet. App. 39a-46a. Basing the ruling on its interpretation of this Court's decision in *Schmerber v. California*, 384 U.S. 757 (1966), the trial court held that the natural dissipation of alcohol in the bloodstream does not constitute a sufficient exigency to justify a warrantless

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[2] Because Respondent had two prior convictions for drunk driving, he was charged with a class D felony under Missouri law, which carries a maximum term of imprisonment of four years. A first time offense for driving while intoxicated is a class B misdemeanor, carrying a maximum punishment of six months in jail. Mo. Rev. Stat. §§ 558.011, 577.010, 577.023 (Cum. Supp. 2010).

[3] Respondent also alleged his right to be free from unreasonable searches and seizures under the Missouri Constitution was violated. (V.A.M.S. Const. Art. I, § 15.) The Missouri Supreme Court has held that Article I, Section 15, provides the exact same guarantees against unreasonable searches and seizures as under the Fourth Amendment, and thus, the same analysis applies to cases under the Missouri Constitution as under the United States Constitution. See *State v. Oliver*, 293 S.W.3d 437, 442 (Mo. banc 2009).

blood draw in a routine driving while intoxicated case. Pet. App. 42a-43a. While acknowledging that *Schmerber* upheld a nonconsensual and warrantless blood draw in a drunk driving case against a Fourth Amendment challenge, the trial court found that *Schmerber* was limited to the "special facts" of that case. *Id.*

The trial court maintained that *Schmerber* requires the existence of additional "special facts," other than the dissipation of alcohol in the bloodstream, before a warrantless blood draw may be justified. These "special facts" were identified by the trial court as a motor vehicle accident resulting in physical injuries requiring emergency medical treatment. Because Respondent was not involved in an accident, and because Respondent did not suffer physical injuries requiring emergency medical treatment, the trial court concluded that *Schmerber* did not apply. The trial court concluded:

> The facts before this court are substantially different than the facts of *Schmerber*. There was no accident. There was no investigation at the scene of the stop other than the field sobriety tests, which took less than ten minutes. The defendant was not injured and did not require emergency medical treatment. This was not an emergency, it was a run of the mill driving while intoxicated case. As in all cases involving intoxication, the Defendant's blood alcohol was being metabolized by his liver. However, a prosecutor was readily available to apply for a search warrant and a

> judge was readily available to issue a warrant. *Schmerber* is not applicable because the "special facts" of that case, the facts which established exigent circumstances, did not exist in this case to justify the warrantless search.

Pet. App. 43a.

2. Missouri Court of Appeals, Eastern District

Petitioner filed an interlocutory appeal to the Missouri Court of Appeals, Eastern District, an intermediate appellate court. The Court of Appeals, in a unanimous 3-0 decision, issued a written opinion that, in its view, the ruling of the trial court should be reversed. Pet. App. 23a-38a.

The Missouri Court of Appeals found that, in applying the exigent circumstances exception to the warrant requirement, "special facts" are not required to justify a warrantless blood draw. Instead, the evanescent nature of blood alcohol evidence creates exigent circumstances such that no warrant is needed to conduct the search. Pet. App. 33a. In its analysis, the Court of Appeals found the interpretation of *Schmerber* from other jurisdictions to be persuasive, including the Wisconsin Supreme Court in *State v. Faust*, 682 N.W.2d 371 (Wis. 2004), cert. denied, 543 U.S. 1089 (2005), and the Sixth Circuit in *United States v. Berry*, 866 F.2d 887 (6th Cir. 1989). Pet.

App. 29a-31a. The Missouri Court of Appeals concluded:

> We have no reason to require 'special facts' in addition to the facts that the officer had ample cause to reasonably believe Defendant was under the influence of alcohol and that Defendant's blood alcohol concentration would continue to decrease, thus destroying evidence, the longer the police waited to conduct a blood test.

Pet. App. 33a. Citing the general interest and importance of the issue, however, the Missouri Court of Appeals transferred the case to the Missouri Supreme Court. Pet. App. 24a, 38a.

3. Missouri Supreme Court

The Missouri Supreme Court disagreed with the Court of Appeals. Affirming the ruling of the trial court in a *per curiam* opinion, the Missouri Supreme Court held that the nonconsensual and warrantless blood draw was a violation of Respondent's Fourth Amendment rights. Pet. App. 1a-22a.

The Missouri Supreme Court held that *Schmerber* was expressly limited to its facts, and, noting that the patrolman was not confronted with these same "special facts," concluded that exigent circumstances did not exist. Pet. App. 2a-3a, 8a-10a, 19a-21a. Explaining its rationale, the Court stated:

> The patrolman here, however, was not faced with the 'special facts' of *Schmerber*. Because

> there was no accident to investigate and there was no need to arrange for the medical treatment of any occupants, there was no delay that would threaten the destruction of evidence before a warrant could be obtained. Additionally, there was no evidence here that the patrolman would have been unable to obtain a warrant had he attempted to do so. The sole special fact present in this case, that blood-alcohol levels dissipate after drinking ceases, is not a *per se* exigency pursuant to *Schmerber* justifying an officer to order a blood test without obtaining a warrant from a neutral judge.

Pet. App. 3a. To support its view that *Schmerber* was limited to its facts, the Missouri Supreme Court found that *Schmerber* explicitly warned against expansive interpretations. Pet. App. 18a. The Court relied on the following language in *Schmerber*:

> It bears repeating, however, that we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.

Pet. App. 18a-19a (quoting *Schmerber*, 384 U.S., at 772). The Missouri Supreme Court concluded that to allow a warrantless blood draw in the absence of

"special facts" would be to ignore this Court's cautious limitation on the holding in *Schmerber*. Pet. App. 19a.

In its analysis, the Missouri Supreme Court acknowledged that a clear and increasing split of authority has recently developed among other state courts of last resort in their respective interpretations of this Court's decision in *Schmerber*. The Missouri Supreme Court expressly disavowed the reasoning of other jurisdictions previously holding that the rapid dissipation of alcohol in the bloodstream constitutes a sufficient exigency to draw blood without a warrant, including the Wisconsin Supreme Court,[4] the Minnesota Supreme Court,[5] and the Oregon Supreme Court.[6] Pet. App. 16a-19a. Ultimately, the Missouri Supreme Court adopted the rationale of the Utah Supreme Court in *State v. Rodriguez*, 156 P.3d 771 (Utah 2007), and the Iowa Supreme Court in *State v. Johnson*, 744 N.W.2d 340 (Iowa 2008), where the courts held that *Schmerber* requires "special facts" beyond the natural dissipation of alcohol in the bloodstream in order to justify a warrantless search. Pet. App. 10a-13a.

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[4] *State v. Bohling*, 494 N.W.2d 399 (Wis. 1993); *State v. Faust*, 682 N.W.2d 371 (Wis. 2004), cert. denied, 543 U.S. 1089 (2005).

[5] *State v. Shriner*, 751 N.W.2d 538 (Minn. 2008), cert. denied, 555 U.S. 1137 (2009); *State v. Netland*, 762 N.W.2d 202 (Minn. 2009).

[6] *State v. Milligan*, 748 P.2d 130 (Or. 1988); *State v. Machuca*, 227 P.3d 729 (Or. 2010).

Petitioner filed a motion for rehearing, which was overruled by the Missouri Supreme Court on March 6, 2012. Pet. App. 47a-48a. The petition for a writ of certiorari was filed in this Court on May 22, 2012, and certiorari was granted on September 25, 2012.

SUMMARY OF ARGUMENT

It is a basic principle of Fourth Amendment law that searches and seizures conducted without a warrant are presumptively unreasonable. See *Katz v. United States*, 389 U.S. 347, 357 (1967). Because the ultimate touchstone of the Fourth Amendment is "reasonableness," however, the warrant requirement is subject to certain exceptions. *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). An action is "reasonable" under the Fourth Amendment, regardless of the individual police officer's state of mind, as long as the circumstances, viewed objectively, justify the action. *Id.*, at 404. Although a search warrant must generally be secured before conducting a search, this Court has recognized that "the exigencies of the situation [may] make the needs of law enforcement so compelling that a warrantless search is objectively reasonable" under the Fourth Amendment. *Michigan v. Fisher*, 130 S.Ct. 546, 548 (2009) (*per curiam*) (quoting *Mincey v. Arizona*, 437 U.S. 385, 393-394 (1978)).

A well-recognized exigency is the need to prevent the imminent destruction of evidence. *Kentucky v.*

King, 131 S.Ct. 1849, 1856 (2011); *Ker v. California*, 374 U.S. 23, 40 (1963) (plurality opinion). Indeed, in *King*, this Court stated that "[i]t is well established that 'exigent circumstances,' including the need to prevent the destruction of evidence, permit police officers to conduct an otherwise permissible search without first obtaining a warrant." *King*, 131 S.Ct., at 1853-1854. Thus, when a law enforcement officer has probable cause to conduct a search, a warrantless search will be justified under the exigent circumstances exception to the warrant requirement if the officer has an objectively reasonable belief there is a risk that evidence will be destroyed during the delay necessary to obtain a search warrant. This general principle applies to warrantless blood testing of drunk drivers. See *id.*, at 1857 n.3 (noting that the warrantless testing for blood alcohol content in *Schmerber* was justified based on the potential destruction of evidence).

The exigency involved in quickly securing blood alcohol evidence during a drunk driving investigation is particularly compelling because alcohol is naturally eliminated from the human body. This Court has recognized that because the alcohol level in a person's bloodstream begins to dissipate after a person stops drinking, blood samples must be obtained quickly before valuable evidence is destroyed. In *Schmerber*, this Court found that the arresting officer might reasonably have believed he was confronted with an emergency in which the delay necessary to obtain a warrant threatened the destruction of evidence

because "the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system." *Schmerber,* 384 U.S., at 770. Later, in *Skinner v. Railway Labor Executives' Ass'n,* 489 U.S. 602, 623 (1989), this Court recognized that because alcohol is eliminated from the bloodstream at a constant rate, "blood and breath samples taken to measure whether these substances were in the bloodstream when a triggering event occurred must be obtained as soon as possible" and that "the delay necessary to procure a warrant nevertheless may result in the destruction of valuable evidence."

The exigency involved in quickly securing blood alcohol evidence during a drunk driving investigation is more compelling than other situations involving a risk of potential destruction of evidence because the alcohol in the bloodstream of a drunk driver is *certain* to disappear, while other types of evidence may only be very likely to disappear. In the case under review, it was an indisputable fact that the best and most probative evidence of the crime was in the process of destruction. Nevertheless, the Missouri Supreme Court held that the warrantless blood test did not fall under the exigent circumstances exception to the warrant requirement. The decision of the Missouri Supreme Court, therefore, actually *requires* the police to stand by and allow the best and most probative evidence of the crime to be destroyed during a drunk driving investigation. Such an approach is wholly

inconsistent with core principles of the Fourth Amendment.

Proper application of the Fourth Amendment must take into account the need for the police to act quickly in order to prevent the destruction of evidence. When a law enforcement officer has probable cause to arrest a person for a drunk driving related crime, it is certainly objectively reasonable to conclude that blood alcohol evidence will continue to dissipate during the inevitable delay necessary to obtain a search warrant. Under these circumstances, it is reasonable for an officer to direct medical personnel at a hospital to draw a blood sample from a drunk driver without first obtaining a search warrant. This comports with Fourth Amendment standards of reasonableness.

Furthermore, allowing a police officer to obtain a warrantless blood test from a drunk driver strikes a favorable balance between legitimate law enforcement interests and the privacy interests of the individual. Under a "totality of the circumstances" balancing analysis, the public interests far outweigh the privacy interests of the individual. The legitimate governmental interests, *i.e.*, the law enforcement interests in promoting public safety on our roads and highways through enforcement of drunk driving laws, is exceptionally strong. A prompt blood test, taken with as little delay as possible, provides the best and most probative evidence of intoxication. The privacy interests of the individual, on the other hand, are minimal. This Court has long-recognized

that a simple blood test, taken by a trained technician in a hospital setting, is a minor intrusion. Additionally, because driving an automobile on public highways is an activity heavily regulated by the government, motorists have a diminished expectation of privacy. The public interest in ridding the Nation's roadways of drunk drivers clearly outweighs the privacy interests of the individual in being subjected to a simple blood test. A compelled blood test taken by medical personnel at the direction of a law enforcement officer, supported by probable cause, is certainly reasonable under the Fourth Amendment. The decision of the Missouri Supreme Court should be reversed.

ARGUMENT

I. Under The Fourth Amendment It Is Objectively Reasonable For A Law Enforcement Officer To Obtain A Warrantless Blood Test From A Drunk Driver To Prevent The Destruction Of Evidence

A. This Court has recognized that the need to prevent the imminent destruction of evidence is a sufficient justification for a warrantless search under the exigent circumstances exception to the Fourth Amendment warrant requirement

The Fourth Amendment protects "persons, houses, papers, and effects, against unreasonable searches and seizures" and provides that "no Warrants shall issue, but upon probable cause." U.S. Const. Amend.

IV. It is a basic principle of Fourth Amendment law that searches and seizures conducted without a warrant are presumptively unreasonable. See *Katz v. United States*, 389 U.S. 347, 357 (1967). Because the ultimate touchstone of the Fourth Amendment is "reasonableness," however, the warrant requirement is subject to certain exceptions. *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). An action is "reasonable" under the Fourth Amendment, regardless of the individual police officer's state of mind, as long as the circumstances, viewed objectively, justify the action. *Id.*, at 404.[7] Although a search warrant must generally be secured before conducting a search, this Court has recognized that "the exigencies of the situation [may] make the needs of law enforcement so compelling that a warrantless search is objectively reasonable" under the Fourth Amendment. *Michigan v. Fisher*, 130 S.Ct. 546, 548 (2009) (*per curiam*) (quoting *Mincey v. Arizona*, 437 U.S. 385, 393-394

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[7] This Court has repeatedly held that a law enforcement officer's subjective motivation for conducting a search is irrelevant in the Fourth Amendment context. See, *e.g.*, *Bond v. United States*, 529 U.S. 334, 338, n.2 (2000) ("[T]he subjective intent of the law enforcement officer is irrelevant in determining whether that officer's actions violate the Fourth Amendment . . . ; the issue is not his state of mind, but the objective effect of his actions"); *Kentucky v. King*, 131 S.Ct. 1849, 1859 (2011) ("[W]e have never held, outside limited contexts such as an 'inventory search or administrative inspection . . . , that an officer's motive invalidates objectively justifiable behavior under the Fourth Amendment.'") (quoting *Whren v. United States*, 517 U.S. 806, 812 (1996)).

(1978)). Probable cause remains as a minimum requirement for a reasonable search, while the existence of exigent circumstances excuses only the necessity of obtaining a warrant. See *Chambers v. Maroney*, 399 U.S. 42, 51 (1970) ("Only in exigent circumstances will the judgment of the police as to probable cause serve as a sufficient authorization for a search.").

This Court has identified several exigencies that can justify a warrantless search, including the "hot pursuit" of a fleeing suspect, *United States v. Santana*, 427 U.S. 38, 42-43 (1976); *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 298-299 (1967); the need to fight a fire and investigate its cause, *Michigan v. Tyler*, 436 U.S. 499, 509 (1978); and the need to render emergency assistance or protect a person from imminent injury, *Brigham City*, 547 U.S., at 403; *Fisher*, 130 S.Ct., at 548-549. Another well-recognized exigency is the need to prevent the imminent destruction of evidence. *Kentucky v. King*, 131 S.Ct. 1849, 1856 (2011); *Ker v. California*, 374 U.S. 23, 40 (1963) (plurality opinion). Indeed, in *King*, this Court stated that "[i]t is well established that 'exigent circumstances,' including the need to prevent the destruction of evidence, permit police officers to conduct an otherwise permissible search without first obtaining a warrant." *King*, 131 S.Ct., at 1853-1854. Thus, when a law enforcement officer has probable cause to conduct a search, a warrantless search will be justified under the exigent circumstances exception to the warrant requirement if the officer has an

objectively reasonable belief there is a risk that evidence will be destroyed during the delay necessary to obtain a search warrant. This general principle applies to warrantless blood testing of drunk drivers. See *id.*, at 1857 n.3 (noting that the warrantless testing for blood alcohol content in *Schmerber* was justified based on the potential destruction of evidence).

B. The exigency in quickly securing blood alcohol evidence is compelling because alcohol naturally dissipates in the bloodstream

This Court has recognized that the level of alcohol in the bloodstream of a drunk driver is not only highly probative evidence in a drunk driving prosecution,[8] but also that this evidence is subject to rapid destruction by the body's natural processes. Because the alcohol level in a person's bloodstream begins to dissipate after a person stops drinking, this Court has recognized that blood samples must be obtained quickly before valuable evidence is destroyed. In *Schmerber*, this Court found that the arresting officer

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[8] Recognizing that blood tests are exceptionally probative in drunk driving prosecutions, this Court has found that they are "a highly effective means of determining the degree to which a person is under the influence of alcohol." *Schmerber*, 384 U.S., at 771. See also *Winston v. Lee*, 470 U.S. 753, 763 (1985) (noting that "results of the blood test were of vital importance if the State were to enforce its drunken driving laws.").

might reasonably have believed he was confronted with an emergency in which the delay necessary to obtain a warrant threatened the destruction of evidence because "the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system." *Schmerber,* 384 U.S., at 770. Later, in *Skinner v. Railway Labor Executives' Ass'n,* 489 U.S. 602, 623 (1989), this Court recognized that because alcohol is eliminated from the bloodstream at a constant rate, "blood and breath samples taken to measure whether these substances were in the bloodstream when a triggering event occurred must be obtained as soon as possible" and that "the delay necessary to procure a warrant nevertheless may result in the destruction of valuable evidence."

A drunk driving investigation involves a unique situation, one in which the destruction of evidence is not only imminent, but inevitable. Indeed, the exigency involved in quickly securing blood alcohol evidence is even more compelling than other situations where a risk of destruction of evidence exists because the alcohol in a suspect's blood is *certain* to disappear, while other types of evidence may only be very likely to disappear. Blood alcohol evidence is extraordinarily unique precisely because it is an indisputable fact that alcohol is naturally and quickly eliminated from the human body. While dissipation rates may vary widely among individuals, it is generally accepted in the relevant scientific community that alcohol dissipates from the human body at an average rate of

between 0.015% and .018% per hour, and, for heavy drinkers, the elimination rate may increase to as rapidly as .022% per hour. See generally K.M. Dubowski, Ph.D., Human Pharmacinetics of Alcohol, Int. Microform L. Leg. Med. 10 (1975); Yale H. Caplan, Ph.D., The Determination of Alcohol in Blood and Breath, 1 Forensic Sciences Handbook ch. 12 (1982); A.W. Jones, Disappearance Rate of Ethanol From the Blood of Human Subjects: Implications in Forensic Toxicology, 38 J. Forensic Sci. 104-118 (1993).

Although the dissipation rate will vary from person to person, one simple fact cannot be refuted – during a drunk driving investigation the best and most probative evidence of the crime is being lost at a significant rate. Because of this undeniable fact, lower courts have repeatedly upheld warrantless blood tests in drunk driving cases against Fourth Amendment challenges, and, in doing so, have emphasized the importance of securing blood alcohol evidence as quickly as possible. See, *e.g.*, *State v. Faust*, 682 N.W.2d 371 (Wis. 2004), cert. denied, 543 U.S. 1089 (2005); *State v. Shriner*, 751 N.W.2d 538 (Minn. 2008), cert. denied, 555 U.S. 1137 (2009); *State v. Milligan*, 748 P.2d 130 (Or. 1988).

Lower courts frequently compare warrantless blood testing of drunk drivers to the situation presented in *Cupp v. Murphy*, 412 U.S. 291 (1973), where this Court approved the nonconsensual and warrantless fingernail scrapings of a murder suspect. In *Cupp*, the defendant had voluntarily appeared at the police station for questioning in connection with

the strangulation death of his estranged wife. *Id.*, at 292. The police noticed a dark spot on his finger, and, suspecting that the spot might be dried blood, requested the defendant to voluntarily allow them to take a sample of scrapings from his fingernails. The defendant refused to voluntarily consent to the fingernail scrapings, and, without obtaining a search warrant, the police proceeded to take the fingernail scrapings over his protest. It was later determined that the sample contained traces of skin, blood cells, and fabric from the victim's nightgown, and the defendant was subsequently arrested and charged with the murder. The incriminating evidence from the fingernail scrapings was admitted at trial over the defendant's objection, resulting in a conviction. *Id.* On appeal, the defendant claimed that the warrantless and nonconsensual fingernail scrapings violated his Fourth Amendment rights. This Court disagreed, holding the search was necessary in order to "preserve the highly evanescent evidence they found under his fingernails." *Id.*, at 296. This Court concluded that the search was reasonable on the basis of three considerations, namely: (1) the existence of probable cause; (2) the very limited nature of the intrusion; and (3) the ready destructibility of the evidence. *Id.*

Cupp v. Murphy, as lower courts have found, illustrates that exigent circumstances may justify a search based on probable cause when the imminent destruction of evidence is likely and the intrusion is

minimal.[9] In *State v. Cocio*, 709 P.2d 1336, 1345 (Ariz. 1985), for example, the Arizona Supreme Court observed that the "highly evanescent nature of alcohol in the defendant's blood stream guaranteed that the alcohol would dissipate over a relatively short period of time." The Court reasoned that, because of this fact, the exigent circumstances in a drunk driving investigation were "even more compelling than *Cupp* since alcohol in a suspect's blood is certain to disappear while the physical evidence on defendant in *Cupp* was only very likely to disappear while a search warrant was obtained." *Id.* See also *Aliff v. State*, 627 S.W.2d 166, 170 (Tex. Crim. App. 1982) (finding that the exigencies which justified the warrantless search in *Cupp* also justified the warrantless blood test because "alcohol in blood is quickly consumed and the evidence would be lost forever."); *State v. Milligan*, 748 P.2d 130, 136 (Or. 1988) (reading *Cupp* and *Schmerber* together and concluding that warrantless extraction of blood was justified because of the evanescent nature of the evidence); *United States v. Berry*, 866 F.2d 887, 891 (6th Cir. 1989) (discussing *Cupp* and finding exigent circumstances existed because "evidence of intoxication begins to dissipate promptly"); *State v. Kristy*, 528 A.2d 390, 392-394 (Conn. App. Ct. 1987); *State v. Shriner*, 751 N.W.2d

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[9] This Court has recognized that blood tests are a minor intrusion, finding that they are commonplace, routine, and painless. See, *e.g.*, *Schmerber*, 384 U.S., at 771. The nature of the intrusion is more fully discussed *infra*, pp. 33-35.

538, 543-544 (Minn. 2008), cert. denied, 555 U.S. 1137 (2009) (applying principles articulated in *Cupp* to warrantless blood tests).

Another situation where the risk of potential destruction of evidence arises with great frequency is in the context of narcotics investigations. Narcotics are easily disposable, and, because of this fact, police officers are often confronted with the risk of potential destruction of evidence. The fact that illegal drugs are easily destroyed, of course, will not always justify a warrantless search. For example, in *Vale v. Louisiana*, 399 U.S. 30 (1970), this Court held that a warrantless entry into a house to recover heroin violated the Fourth Amendment. There, police officers were conducting surveillance outside of the defendant's house when they saw him emerge and engage in a drug deal. The officers approached and arrested the defendant on the front steps of the house, after which one of the officers conducted a cursory inspection of the house to make sure nobody else was present. After satisfying themselves that no one else was inside, the officers proceeded to conduct a warrantless search of the house and discovered a quantity of heroin in a bedroom. *Id.*, at 32-33. This Court held the warrantless search of the house violated the Fourth Amendment. Citing *Schmerber*, this Court found that since "[t]he goods ultimately seized were not in the process of destruction[,]" the warrantless

search was not justified. *Vale*, 399 U.S., at 35.[10] Unlike *Schmerber*, where the blood alcohol evidence was obviously "in the process of destruction," there was no showing in *Vale* that the heroin was in the process of being destroyed. Indeed, since the officers had already satisfied themselves that nobody else was present inside the home, there was not even a remote

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[10] In a dissenting opinion, Justice Black challenged the assumption that evidence must be in the *actual process* of destruction before a warrantless search may be justified: "[T]he Court suggests that the contraband was not 'in the process of destruction.' None of the cases cited by the Court supports the proposition that 'exceptional circumstances' exist only when the process of destruction has already begun. On the contrary, we implied that those circumstances did exist when 'evidence or contraband was threatened with removal or destruction.'" *Vale*, 399 U.S., at 39 (Black, J., dissenting) (quoting *Johnson v. United States*, 333 U.S. 10, 15 (1948)). Subsequent decisions of this Court have found that drugs do not need to be in the actual process of destruction before dispensing with Fourth Amendment requirements in other contexts. See, *e.g.*, *Illinois v. McArthur*, 531 U.S. 326, 333 (2001) (detention of defendant outside his home during two-hour delay to obtain search warrant was reasonable where "the police had good reason to fear that, unless restrained, [defendant] would destroy the drugs before they could return with a warrant."); *Richards v. Wisconsin*, 520 U.S. 385, 394-395 (1997) (failure to comply with the knock-and-announce requirement during execution of search warrant for drugs was justified because "the officers had a reasonable suspicion that [defendant] might destroy evidence if given further opportunity to do so."); *United States v. Banks*, 540 U.S. 31, 37-40 (2003) (interval of 15-20 seconds from officers' knock and announcement of search warrant until forced entry was reasonable given exigency of possible destruction of evidence, *i.e.*, a risk that suspect would destroy cocaine).

possibility that the heroin could have been destroyed. Thus, the claim of exigency was properly rejected.

In contrast, in the context of a drunk driving investigation an inherent exigency always exists due to the very nature of blood alcohol evidence itself. See, *e.g.*, *State v. Woolery*, 775 P.2d 1210, 1212 (Idaho 1989) ("destruction of the evidence by metabolism of alcohol in the blood provides an inherent exigency which justifies the warrantless search."); *State v. Baker*, 502 A.2d 489, 493 (Me. 1985) ("The bodily process that eliminates alcohol also provides exigent circumstances obviating the need to obtain a warrant prior to administering a blood test."); see also 3 W. LaFave, *Search and Seizure*, § 5.4(b), at 199 (4th ed. 2004) (discussing blood alcohol evidence and noting that "the 'evanescent' character of the evidence is inherent in its nature and does not depend upon any motive of the defendant to destroy it."). Blood alcohol evidence is thus distinguishable from other situations involving a risk of potential destruction of evidence. In other situations, police officers may very well have an objectively reasonable belief that evidence might be in the process of destruction, but rarely will they be absolutely certain. Whether the police have an objectively reasonable belief that a suspect is in the process of flushing drugs down a toilet, shredding counterfeit documents, or bleaching blood-stained clothing in a washing machine, seldom will law enforcement authorities know for sure that evidence is being destroyed. With blood alcohol evidence, on the other hand, it is an indisputable fact

that the evidence is actively being destroyed with every minute that passes.

C. The approach adopted by the Missouri Supreme Court unreasonably requires police officers to allow probative evidence to be destroyed

In the case under review, the Missouri Supreme Court acknowledged that the evidence was, in fact, in the actual process of destruction. See Pet. App. 20a (recognizing that Respondent's body "was working naturally to expunge the alcohol in his system.").[11] Although it was never in dispute that the best and most probative evidence of the crime was being destroyed, the Missouri Supreme Court nevertheless concluded that the exigent circumstances exception to the warrant requirement did not apply. The decision of the Missouri Supreme Court, therefore, actually *requires* police officers to stand by and allow the best, most probative evidence to be destroyed during a drunk driving investigation. Such an approach is wholly inconsistent with core principles of the Fourth Amendment. Proper application of the Fourth Amendment must take into account the need for the police to act quickly in order to prevent the destruction of evidence. When a law enforcement officer

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[11] Likewise, the trial court made the same acknowledgement in its order granting Respondent's motion to suppress. See Pet. App. 43a ("As in all cases involving intoxication, the Defendant's blood alcohol was being metabolized by his liver.").

has probable cause to arrest a person for a drunk driving related crime, it is certainly objectively reasonable to conclude that blood alcohol evidence will continue to dissipate during the inevitable delay necessary to obtain a search warrant.[12] Under these circumstances, it is reasonable for an officer to direct medical personnel at a hospital to draw a blood sample from a drunk driver without first obtaining a search warrant. This comports with Fourth Amendment standards of reasonableness.

II. Under The Totality Of The Circumstances, Allowing A Police Officer To Obtain A Warrantless Blood Test From A Drunk Driver Based Upon Probable Cause Strikes A Favorable Balance Between Legitimate Law Enforcement Interests And The Privacy Interests Of The Individual

The touchstone of the Fourth Amendment is reasonableness, and "the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Delaware v. Prouse*, 440 U.S. 648, 654 (1979). See also *United States v. Knights*, 534

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[12] There will often be a significant delay involved in acquiring a search warrant in the middle of the night. In Cape Girardeau County, obtaining a search warrant in the middle of the night involves an average delay of approximately two hours. J.A. 52-54, 70.

U.S. 112, 118-119 (2001) (examining the totality of the circumstances, "the reasonableness of a search is determined 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'") (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)); *Pennsylvania v. Mimms*, 434 U.S 106, 109 (1977) ("Reasonableness . . . depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.'") (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975)). Balancing these concerns, the legitimate interests in law enforcement clearly outweigh the privacy interests of the individual.

A. Legitimate governmental interests are exceptionally strong

1. Drunk driving presents a direct and significant threat to public safety

Drunk driving is a serious and dangerous problem that affects the entire Nation. This Court summarized the dangers posed by drunk drivers on our public roads and highways over twenty years ago:

> No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it. Media reports of alcohol-related death and mutilation on the Nation's roads are legion. The anecdotal is confirmed by the statistical. Drunk drivers cause an annual death toll of over 25,000 and

> in the same time span cause nearly one million personal injuries and more than five billion dollars in property damage. For decades, this Court has repeatedly lamented the tragedy. The increasing slaughter on our highways . . . now reaches the astounding figures only heard of on the battlefield.

Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 451 (1990) (citations and internal quotation marks omitted). See also *South Dakota v. Neville*, 459 U.S. 553, 558 (1983) (noting that drunk driving "occurs with tragic frequency on our Nation's highways," and that the "carnage caused by drunk drivers is well documented and needs no detailed recitation"). Drunk driving remains a serious nationwide problem to this day. According to FBI statistics, over 1.41 million drivers were arrested in 2010 for driving under the influence of alcohol or drugs. (Federal Bureau of Investigation, "Crime in the United States: 2010"). Tragically, 10,228 people were killed in drunk driving crashes in 2010, and approximately 345,000 people were injured. (National Highway Traffic Safety Administration, Fatality Analysis Reporting System data, 2011). Additionally, it is estimated that drunk driving costs society approximately $132 billion every year. *Id.*

The State of Missouri has recognized driving while intoxicated is a very serious crime. A first time offense is punishable by up to six months in jail; a second offense is punishable by up to one year in jail; a third offense is punishable by up to four years in prison; a fourth offense is punishable by up to seven

years in prison, and a fifth or subsequent offense is punishable by up to fifteen years in prison.[13] The penalties for drunk driving proscribed by the Missouri legislature serve as a clear expression of the State's interest in enforcing drunk driving laws.[14] This public interest, to be sure, is most compelling.

2. A blood test provides the best and most probative evidence of the crime

The State obviously has a legitimate interest in enforcing its drunk driving laws. A prompt blood

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[13] The classification of Missouri's DWI offenses is set out at Mo. Rev. Stat. §§ 577.010 and 577.023 (2010).

[14] In *Welsh v. Wisconsin*, 466 U.S. 740, 754 (1984), this Court found that the classification of an offense serves as a clear indication of the State's interest. Holding that a warrantless nighttime entry into a home to arrest a suspect for driving while intoxicated was prohibited by the Fourth Amendment, this Court noted that, at the time, a first offense for drunk driving in the State of Wisconsin was classified as a noncriminal civil forfeiture offense for which no jail time was possible. This Court concluded that the Fourth Amendment prohibits the police from making a warrantless entry into the home to arrest a suspect for a nonjailable traffic offense. *Id.*, at 750-754. Later, in *Illinois v. McArthur*, 531 U.S. 326 (2001), this Court held it was reasonable to detain a suspect outside of his home while the police obtained a search warrant during an investigation of a misdemeanor marijuana offense that carried the possibility of jail time. In so holding, this Court drew a distinction between offenses which were "jailable" and those that were "nonjailable." *Id.*, at 336. See also *People v. Thompson*, 135 P.3d 3, 9 (Cal. 2006), cert. denied, 549 U.S. 980 (2006) (approving entry into the home of a drunk driving suspect without a warrant to arrest him for driving while intoxicated, and distinguishing case from *Welsh* because the crime was a *jailable* offense).

test of a drunk driver provides the best and most probative evidence of intoxication. Indeed, this Court has repeatedly emphasized the importance of blood alcohol evidence in drunk driving prosecutions. In *Breithaupt v. Abram*, 352 U.S. 432, 439-440 (1957), this Court found that a blood test "is a scientifically accurate method of detecting alcoholic content in the blood, thus furnishing an exact measure upon which to base a decision as to intoxication" and that, by utilizing blood tests, "the issue of driving while under the influence of alcohol can often . . . be taken out of the confusion of conflicting contentions." In *Schmerber*, this Court found that "[e]xtraction of blood samples for testing is a highly effective means of determining the *degree* to which a person is under the influence of alcohol." *Schmerber*, 384 U.S., at 771 (emphasis added). Significantly, nineteen years after writing the majority opinion of this Court in *Schmerber*, Justice Brennan reinforced just how crucial blood alcohol evidence is in drunk driving prosecutions. Writing the majority opinion in *Winston v. Lee*, 470 U.S. 753 (1985), Justice Brennan stressed that "[e]specially given the difficulty of proving drunkenness by other means, . . . results of the blood test were of vital importance if the State were to enforce its drunken driving laws." *Id.*, at 763. See also *South Dakota v. Neville*, 459 U.S. 553, 564 (1983) (noting that "the inference of intoxication arising from a positive blood-alcohol test is far stronger than that arising from a refusal to take the test.").

The State clearly has an exceptionally strong interest in securing blood samples, with as little delay

as possible, in order to enforce drunk driving laws. See, *e.g.*, *State v. Bohling*, 494 N.W.2d 399, 405 (Wis. 1993) (finding that because the probative value of blood alcohol evidence is diminished by delayed testing, warrantless blood testing of drunk drivers facilitates the state's ability to protect this significant public interest). The governmental interests in promoting safety on our public roads and highways are not only legitimate, but vital.

B. Privacy interests are minimal

1. A blood test is a minor intrusion

This Court has long recognized that a simple blood test is a minor intrusion for constitutional purposes. In *Breithaupt v. Abram*, 352 U.S. 432 (1957), this Court upheld the results of an involuntary and warrantless blood test taken from a defendant in a hospital after he was involved in a fatal automobile accident. A state patrolman, after noticing the smell of liquor on the defendant's breath, arranged for an attending physician to withdraw a sample of blood while the defendant was unconscious. The results of the test revealed the defendant was intoxicated, which led to a conviction for involuntary manslaughter. *Id.*, at 433. On appeal, defendant contended that the involuntary blood test was comparable to the conduct condemned by this Court in *Rochin v. California*, 342 U.S. 165 (1952), where this Court found that the warrantless and forceful removal of a suspect from his home and the subsequent forced pumping of

his stomach to extract narcotic pills involved conduct so "brutal" and "offensive" that it "shocked the conscience" and therefore violated due process. This Court rejected the comparison, holding that "there is nothing 'brutal' or 'offensive' in the taking of a sample of blood when done . . . under the protective eye of a physician." *Breithaupt*, 352 U.S., at 435. This Court reasoned:

> Due process is not measured by the yardstick of personal reaction or the sphygmogram of the most sensitive person, but by that whole community sense of 'decency and fairness' that has been woven by common experience into the fabric of acceptable conduct. . . . The blood test procedure has become routine in our everyday life. It is a ritual for those going into military service as well as those applying for marriage licenses. Many colleges require such tests before permitting entrance and literally millions of us have voluntarily gone through the same, though a longer, routine in becoming blood donors.

Breithaupt, 352 U.S., at 436. Unlike the conduct involved in *Rochin*, which was "bound to offend even hardened sensibilities[,]" *Rochin*, 342 U.S., at 172, this Court concluded that a simple blood test "would not be considered offensive by even the most delicate." *Breithaupt*, 352 U.S., at 436.

Subsequent decisions of this Court have reaffirmed that a blood test is a minor intrusion. In

Schmerber, this Court approved the warrantless blood test taken from a drunk driving suspect, noting that the blood was drawn by a physician in a hospital environment according to accepted medical practices. This Court found that blood tests are "commonplace in these days of physical examination and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain." *Schmerber*, 384 U.S., at 771. See also *Winston v. Lee*, 470 U.S. 753, 762 (1985) ("*Schmerber* recognized society's judgment that blood tests do not constitute an unduly extensive imposition on an individual's personal privacy and bodily integrity."); *South Dakota v. Neville*, 459 U.S. 553, 563 (1983) ("The simple blood-alcohol test is so safe, painless, and commonplace . . . that the state could legitimately compel the suspect, against his will, to accede to the test."); *Skinner*, 489 U.S., at 625 (discussing *Schmerber* and noting that "the intrusion occasioned by a blood test is not significant").

2. Motorists have a diminished expectation of privacy

Driving an automobile is an activity which is heavily regulated by the government. Because of this pervasive regulation, a motorists' expectation of privacy is, at least to a certain degree, diminished. See *New York v. Class*, 475 U.S. 106, 113 (1986) (noting that because automobiles are the subject of pervasive regulation, "[e]very operator of a motor vehicle must

expect that the State, in enforcing its regulations, will intrude to some extent upon that operator's privacy.").

It is well-established that driving an automobile on the public roads and highways is a privilege, and not a right. See, *e.g.*, *State v. Hoover*, 916 N.E.2d 1056, 1062 (Ohio 2009), cert. denied, 130 S.Ct. 2380 (2010). Individual states set standards and criteria citizens must meet in order to obtain a driver's license and thereby avail themselves of this privilege. After acquiring a driver's license, a motorist is expected to abide by certain rules and comply with various regulations. Among other things, states require periodic renewal of those licenses, mandate that drivers purchase and maintain liability insurance, and, of course, states retain the power and authority to suspend or revoke a motorist's license if he or she has abused the privilege of driving an automobile by, for example, accumulating too many traffic tickets.

As part of the regulation of motor vehicles, all fifty states have what is known as an "implied consent" law.[15] Although these laws vary from state to state, they all share the same general concept, *i.e.*, when a motorist applies for and accepts an operator's license, he or she "impliedly consents" to submission to a chemical test of his or her blood alcohol level when arrested for driving while intoxicated. A common feature of these statutes provides for the

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[15] The Missouri implied consent law, for example, is codified at Mo. Rev. Stat. §§ 570.020 through 577.041 (2010).

suspension or revocation of an arrestee's license upon refusal to submit to a chemical test.[16] Because the state has a legitimate interest in keeping dangerously intoxicated drivers off the road, the overriding purpose of an "implied consent" law is, ultimately, to remove drunk drivers from the public roadways. See, *e.g.*, *Hinnah v. Director of Revenue*, 77 S.W.3d 616, 619 (Mo. banc 2002) (the "object and purpose of the Missouri implied consent law is to rid the highways of drunk drivers.").

Because driving a motor vehicle on the public roads and highways is a privilege, and not a right, lower courts have found that motorists have a reduced expectation of privacy. This is particularly true in cases involving drunk driving, where the activity at issue constitutes a serious risk to public safety. See, *e.g.*, *State v. Faust*, 682 N.W.2d 371, 377 (Wis. 2004), cert. denied, 543 U.S. 1089 (2005) (discussing the serious public safety concerns involved when a driver chooses to drive under the influence of alcohol and finding that such concerns reduce a driver's expectation of privacy). Simply put, it is difficult to

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[16] It is well-settled that "a person suspected of drunk driving has no constitutional right to refuse to take a blood-alcohol test." *South Dakota v. Neville*, 459 U.S., at 560 n.10. Indeed, in *Neville*, this Court stated that "*Schmerber* . . . clearly allows a State to force a person suspected of driving while intoxicated to submit to a blood alcohol test." *Id.*, at 559. The right to refuse the blood alcohol test was, as this Court put it, "simply a matter of grace bestowed by the South Dakota legislature." *Id.*, at 565.

imagine a greater abuse of the privilege of operating a motor vehicle on our public roads and highways than to drive an automobile while intoxicated. Such conduct endangers the lives of other motorists and presents a direct threat to public safety.

C. The search was supported by probable cause

In the case under review, probable cause clearly existed. Respondent was pulled over after Cpl. Winder observed that he was speeding and crossing over the centerline of the road. J.A. 19, 29-30. Upon his initial contact with Respondent, Cpl. Winder immediately noticed various signs of intoxication, including bloodshot eyes, slurred speech, and a strong odor of alcohol on his breath. J.A. 19, 31. When Cpl. Winder asked Respondent to step out of his truck, he observed that Respondent was unsteady on his feet. Respondent then performed poorly on a series of standard field sobriety tests, including the horizontal gaze nystagmus test, the one-leg-stand test, and the walk-and-turn test. J.A. 20, 31-33. Additionally, Respondent refused to blow into a portable breath testing device at the scene of the stop, and further advised Cpl. Winder that he intended to refuse to provide a breath sample at the county jail. J.A. 20, 33-34.

Cpl. Winder clearly had probable cause to arrest Respondent for driving while intoxicated. The same facts establishing probable cause to arrest Respondent for driving while intoxicated also provided

probable cause for the search, *i.e.*, probable cause to believe the blood sample would reveal evidence of intoxication. See, *e.g.*, *United States v. Berry*, 866 F.2d 887, 891 (6th Cir. 1989). Under a totality of the circumstances balancing analysis, a search supported by clear probable cause cannot be said to infringe upon an "individual's right to personal security free from *arbitrary* interference by law officers." *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977) (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975) (emphasis added).

D. The Search was conducted in a reasonable manner

When applying the totality of the circumstances analysis under the Fourth Amendment to the facts of a particular search, another factor to consider is whether the search itself was conducted in a reasonable manner. *Schmerber*, 384 U.S., at 771. In *Schmerber*, this Court found the blood test was performed in a reasonable manner in that the blood sample "was taken in a hospital environment according to accepted medical practices." *Id.* In so holding, this Court warned against procedures that might be unreasonable:

> We are thus not presented with the serious questions which would arise if a search involving use of a medical technique, even of the most rudimentary sort, were made by other than medical personnel or in other than a medical environment – for example, if

> it were administered by police in the privacy of the stationhouse. To tolerate searches under these conditions might be to invite an unjustified element of personal risk of infection or pain.

Id., at 771-772. The *Schmerber* Court thus made it clear that the manner of a blood draw search is reasonable when it is done in a hospital environment by trained medical personnel.

In the case under review, Cpl. Winder had probable cause to believe Respondent was driving drunk and rushed him to the hospital where the search itself was conducted in a reasonable manner. It was done in a hospital environment by medical personnel. This was not a blood draw performed at the station house by a police officer with no medical training. Rather, the person drawing the blood was a trained medical technician. The procedure was a simple and routine drawing of one 9-milliliter vial of blood. The amount drawn was far less than the one pint (473 milliliters) typically extracted when the Red Cross draws blood from a donor. American Red Cross, *Donation FAQs,* http://www.redcross.org/donating-blood/donation-faqs (last visited November 6, 2012). No weapons were displayed. No excessive force was used. Respondent was not injured in any way. The blood was drawn only one time. It was not a situation where the officers demanded the medical personnel to draw multiple vials of blood. The search was an intrusion limited to the minimum intrusion necessary to accomplish its purpose. Fourth Amendment cases

are always fact-specific. Under the totality of the circumstances of this case, the search conducted was reasonable in all respects. Other courts across the country have also ruled that the manner of such a blood draw is reasonable under the Fourth Amendment. See, *e.g.*, *United States v. Berry*, 866 F.2d 887, 890 (6th Cir. 1989) ("The method of testing was safe and reasonable and administered by qualified personnel."); *State v. Faust*, 682 N.W.2d 371, 382 (Wis. 2004), cert. denied, 543 U.S. 1089 (2005) ("[T]he method used to take the blood sample is a reasonable one and performed in a reasonable manner[.]"); *State v. Kajewski*, 648 N.W.2d 385, 396 (Wis. 2002) ("[T]he blood draw was taken in a hospital by a registered nurse. Thus, the blood draw was effected in a reasonable manner.")

E. Balancing these concerns, the legitimate governmental interests far outweigh the privacy interests of the individual

Under a "totality of the circumstances" balancing analysis, the public interests far outweigh the privacy interests of the individual. No one would seriously dispute that the legitimate governmental interests, *i.e.*, the law enforcement interests in promoting public safety on our roads and highways through enforcement of drunk driving laws, is exceptionally strong. A prompt blood test, taken with as little delay as possible, provides the best and most probative evidence of intoxication. The privacy interests of the

individual, on the other hand, are minimal. This Court has long-recognized that a simple blood test, taken by a trained technician in a hospital setting, is a minor intrusion. Furthermore, because driving an automobile on public highways is an activity heavily regulated by the government, motorists have a diminished expectation of privacy. The public interest in ridding the Nation's roadways of drunk drivers clearly outweighs the privacy interests of the individual in being subjected to a simple blood test. A compelled blood test taken by medical personnel at the direction of a law enforcement officer, supported by probable cause, is certainly reasonable under the Fourth Amendment.

III. The Missouri Supreme Court Misinterpreted *Schmerber v. California*

A. Other courts have rejected the narrow and restrictive interpretation of *Schmerber* adopted by the Missouri Supreme Court

The Missouri Supreme Court, in holding that the nonconsensual and warrantless blood test violated Respondent's Fourth Amendment rights, held that *Schmerber* was limited to its "special facts." Because Cpl. Winder was not confronted with these same "special facts," the Court concluded that exigent circumstances did not exist. Pet. App. 2a-3a, 8a-10a, 19a-21a. Explaining its rationale, the Court stated:

> The patrolman here, however, was not faced with the 'special facts' of *Schmerber*. Because there was no accident to investigate and there was no need to arrange for the medical treatment of any occupants, there was no delay that would threaten the destruction of evidence before a warrant could be obtained. Additionally, there was no evidence here that the patrolman would have been unable to obtain a warrant had he attempted to do so. The sole special fact present in this case, that blood-alcohol levels dissipate after drinking ceases, is not a *per se* exigency pursuant to *Schmerber* justifying an officer to order a blood test without obtaining a warrant from a neutral judge.

Pet. App. 3a. The approach adopted by the Missouri Supreme Court is not only unnecessarily restrictive, but, more fundamentally, it misapplies Fourth Amendment principles. Other courts have rejected such a narrow interpretation of *Schmerber* and properly applied the exigent circumstances exception to the Fourth Amendment warrant requirement in the context of a drunk driving investigation.

For example, in *State v. Bohling*, 494 N.W.2d 399 (Wis. 1993), the Wisconsin Supreme Court adopted a more reasonable interpretation of *Schmerber*. There, the Court held that the dissipation of alcohol from a person's bloodstream constitutes a sufficient exigency to justify a warrantless blood draw as long as the blood draw is taken at the direction of a law enforcement officer from a person lawfully arrested for a

drunk driving related crime, and there is a clear indication that the blood draw will produce evidence of intoxication. *Id.*, at 406. In reaching this conclusion, the Court noted that a "well-recognized exigent circumstance is the threat that evidence will be lost or destroyed if time is taken to obtain a warrant." *Id.*, at 401. Analyzing *Schmerber*, the Court stated:

> *Schmerber* can be read in either of two ways: (a) that the rapid dissipation of alcohol in the bloodstream alone constitutes a sufficient exigency for a warrantless blood draw to obtain evidence of intoxication following a lawful arrest for a drunk driving related violation or crime – as opposed to taking a blood sample for other reasons, such as to determine blood type; or (b) that the rapid dissipation of alcohol in the bloodstream, coupled with an accident, hospitalization, and the lapse of two hours until arrest, constitute exigent circumstances for such a blood draw.

Bohling, 494 N.W.2d, at 402. Unlike the restrictive approach adopted by the Missouri Supreme Court, the Wisconsin Supreme Court concluded that the most reasonable and logical interpretation of *Schmerber* was the first one set forth. The Court reasoned:

> A logical analysis of the *Schmerber* decision indicates that the exigency of the situation presented was caused solely by the fact that the amount of alcohol in a person's bloodstream diminishes over time. The fact that an accident occurred and that the defendant was taken to the hospital did not increase

> the risk that evidence of intoxication would be lost. A hospital trip to another location at which a medically qualified person is present is standard procedure for taking a blood sample in a drunk driving case, regardless of whether an accident occurred.

Bohling, 494 N.W.2d, at 402-403. The *Bohling* Court's analysis is absolutely correct. It makes no logical sense to hold that the constitutionality of a blood draw for a drunk driver depends upon whether he veered off the road and struck a tree.

Later, in *State v. Faust*, 682 N.W.2d 371, 378 (Wis. 2004), cert. denied, 543 U.S. 1089 (2005), the Wisconsin Supreme Court reaffirmed that the exigency justifying a warrantless blood draw is the rapid metabolization and dissipation of alcohol in the bloodstream. There, the defendant was pulled over in a routine traffic stop, exhibited signs of intoxication, and was arrested for driving while intoxicated. *Id.*, at 374. The defendant consented to a breath test for chemical analysis, which revealed his blood alcohol content was slightly above the legal limit. *Id.* Believing that he needed to secure additional evidence of intoxication, the arresting officer requested the defendant to voluntarily provide a blood sample, which he refused. *Id.* Without attempting to obtain a search warrant, the officer then transported the defendant to a local hospital where a medical technician administered a blood test. *Id.*

The Wisconsin Supreme Court upheld the warrantless and nonconsensual blood test. The Court

reiterated that "*Schmerber* stands for the proposition that the fact that alcohol rapidly dissipates in the bloodstream justifies an officer's belief that he is faced with 'an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatens the destruction of evidence.'" *Faust*, at 377 (quoting *Schmerber*, 384 U.S., at 770). The Court reasoned:

> The fact that the police have obtained a presumably valid chemical sample of the defendant's breath indicating the defendant's level of intoxication does not change the fact that that the alcohol continues to dissipate from the defendant's bloodstream. The evidence sought 'remains on a course to be destroyed.'

Faust, 682 N.W.2d, at 378 (citation omitted). The Court concluded that the presence of one presumptively valid chemical sample of the defendant's breath does not extinguish the exigent circumstances justifying a warrantless blood draw. *Id.*, at 379. Thus, "[t]he nature of the evidence sought, not the existence of other evidence, determines the exigency." *Id.*

The Oregon Supreme Court likewise held that it is the evanescent nature of the evidence sought that justifies the taking of a blood sample without a search warrant. *State v. Milligan*, 748 P.2d 130, 136 (Or. 1988). In so holding, the Court first determined that the arresting officer in that case did, in fact, have probable cause to believe that an analysis of the defendant's blood would yield evidence that he had

committed an alcohol-related crime. *Id.*, at 134. The Court then turned its attention to whether the police were required to obtain a search warrant before ordering the blood draw and ultimately concluded that the warrantless blood draw was justified under the exigent circumstances exception to the warrant requirement. *Id.* The Court observed that "[w]hen [defendant] was seized, the officers had probable cause to believe that defendant was a vessel containing evidence of a crime he had committed – evidence that was dissipating with every breath he took." *Id.* The Court noted that in order to accurately determine the level of alcohol in the suspect's blood at the time of the alleged crime, the police must obtain an initial sample of the suspect's blood with as little delay as possible. *Id.*

Analyzing *Schmerber*, the Oregon Supreme Court concluded that the "special facts" referenced in *Schmerber* were the evanescent nature of alcohol in the blood, and the fact that the blood test was reasonable in that it was performed by a physician in a hospital environment according to accepted medical practices. *Milligan*, 748 P.2d, at 135. Unlike the Missouri Supreme Court, the Oregon Supreme Court did not find that an accident resulting in physical injuries requiring emergency medical attention were "special facts" necessary to justify a warrantless blood draw. Instead, the Court found that *Schmerber* "relied on the exigency created by the evanescent nature of blood alcohol and the danger that important evidence

would disappear without an immediate search." *Milligan*, 748 P.2d, at 135.

The Minnesota Supreme Court reached a similar conclusion in *State v. Shriner*, 751 N.W.2d 538 (Minn. 2008), cert. denied, 555 U.S. 1137 (2009). After carefully reviewing *Schmerber*, the Court held that the dissipation of alcohol in a defendant's blood creates what it described as a "single-factor exigent circumstance" that will justify a warrantless and nonconsensual blood draw. The Court based its holding on the need to prevent the imminent destruction of evidence, observing that with every passing minute, the most probative evidence is subjected to destruction by the body's natural processes. *Id.*, at 545. The Court recognized that "[i]t is undisputed that as a result of the body's physiological processes, the blood-alcohol content in a defendant's blood dissipates with the passage of every minute." *Id.*, at 546.

In so holding, the Minnesota Supreme Court rejected an approach that would require law enforcement officers to consider the length of delay in obtaining a search warrant in determining whether exigent circumstances exist. *Id.* The Court found that requiring an officer in the field to speculate on a range of other factors outside of the officer's control would place an unreasonable burden on law enforcement. *Id.*, at 549. Instead, the Court simply recognized that under "single-factor exigency" it is objectively reasonable to conclude that the alcohol content in a defendant's blood dissipates with the passage of time due to the human body's natural, physiological processes.

Id., at 548. A warrantless search is justified based on the imminent destruction of evidence when there is the potential loss of evidence during the delay necessary to obtain a warrant. *Id.* Since it is undisputed that the loss of the most probative evidence occurs during the time it takes to obtain a warrant, exigent circumstances are present based on the imminent destruction of evidence. *Id.*, at 549.

In a subsequent holding, the Minnesota Supreme Court reaffirmed that the evanescent nature of the evidence creates the conditions that justify a warrantless search. *State v. Netland*, 762 N.W.2d 202, 213 (Minn. 2009). In *Netland*, the defendant was charged with the misdemeanor offenses of driving while intoxicated and refusing a chemical test. *Id.*, at 205-206. The Court noted that whether the degree of the underlying offense constitutes a felony or a lesser crime is immaterial to the circumstances created by the dissipating blood alcohol evidence. *Id.*, at 213. Rather, it is the chemical reaction of alcohol in the person's body that drives the conclusion about exigency. *Id.* The Court concluded that "no warrant is necessary to secure a blood-alcohol test where there is probable cause to suspect a crime in which chemical impairment is an element of the offense." *Id.*, at 214.

The Ohio Supreme Court expressed a similar view in *State v. Hoover*, 916 N.E.2d 1056 (Ohio 2009), cert. denied, 130 S.Ct. 2380 (2010). Discussing *Schmerber*, the Court stated that "if an officer has probable cause to arrest a driver for DUI, the result of an analysis of a blood sample taken over the

driver's objection and without consent is admissible in evidence, even if no warrant had been obtained." *Id.*, at 1060. The Court found this is so because "delaying the test to get a warrant would result in a loss of evidence." *Id.*

The Court of Criminal Appeals of Tennessee likewise reached a similar conclusion in *State v. Humphreys*, 70 S.W.3d 752 (Tenn. Crim. App. 2001). There, the defendant was convicted of a misdemeanor offense of driving under the influence of alcohol after being pulled over in a routine traffic stop. *Id.*, at 756. Relying on *Schmerber*, the Court found a warrantless blood test was reasonable under the Fourth Amendment. The Court held that "based upon the fact that evidence of blood alcohol content begins to diminish shortly after drinking stops, a compulsory breath or blood test, taken with or without the consent of the donor, falls within the exigent circumstances exception to the warrant requirement." *Id.*, at 760-761. See also *State v. Fletcher*, 688 S.E.2d 94, 97-98 (N.C. Ct. App. 2010) (approving warrantless blood test after a routine stop at a sobriety checkpoint and finding that, under *Schmerber,* "probable cause and the 'destruction of evidence' caused by the body's diminution of alcohol in the blood stream together meet the Fourth Amendment's requirements for a reasonable . . . [and] warrantless search").

In *United States v. Berry*, 866 F.2d 887, 890 (6th Cir. 1989), the Sixth Circuit upheld a warrantless blood test against a Fourth Amendment challenge. After reviewing *Schmerber*, the Court concluded the

search was reasonable because the officer had ample cause to believe the defendant was under the influence of alcohol, and because the method of testing was safe and reasonable. *Id.*, at 890. The Court found that because evidence of intoxication begins to dissipate promptly, it was evident that there were exigent circumstances justifying the warrantless blood draw. *Id.*, at 891. Although the defendant was involved in a serious accident resulting in physical injuries, the Sixth Circuit did not identify these facts as critical factors in its analysis. Instead, the Court simply concluded, "[w]e find no constitutional violation in police direction of qualified medical personnel at a medical institution or facility without a warrant to administer a blood test when the police have probable cause to suspect that the results of the blood test would be positive." *Id.*

Additionally, the Fourth Circuit has applied the exigent circumstances exception to approve warrantless breath tests in routine drunk driving cases. In *United States v. Reid*, 929 F.2d 990 (4th Cir. 1991), a consolidation of two cases involving routine traffic stops on the George Washington Memorial Parkway, both defendants showed signs of intoxication, failed field sobriety tests, and were arrested for driving while intoxicated. There were no accidents involved in either case, nor were there any physical injuries. The Fourth Circuit rejected the contention that warrantless breath tests violated the Fourth Amendment. The Court observed that "[t]he crime of DWI presents a unique situation in that the most reliable evidence of whether a person is driving while 'legally

drunk' is contained in that person's body." *Id.*, at 994. Relying on *Schmerber*, the Court held the warrantless breath tests were justified under the exigent circumstances exception to the warrant requirement. *Id.*, at 993. The Court further found that the decision of this Court in *Skinner* "reiterated the notion that time is of the essence when there is a need to test alcohol in the body when it stated that 'the delay necessary to procure a warrant may nevertheless result in the destruction of valuable evidence.'" *Id.* (quoting *Skinner*, 489 U.S., at 623).

As these courts have correctly held, an accident and physical injuries are not the "special facts" required to trigger the exigent circumstances exception to the Fourth Amendment warrant requirement in the context of a drunk driving investigation. Instead, the focus of the courts should properly be on the indisputable fact that alcohol naturally dissipates in the bloodstream, and that without an immediate search, probative evidence inevitably will be destroyed.

B. The ability of a police officer to apply for a search warrant does not diminish the exigency

The Missouri Supreme Court, holding that exigent circumstances did not exist, stated that "there was no evidence here that the patrolman would have been unable to obtain a warrant had he attempted to do so." Pet. App. 3a. What the Missouri Supreme

Court ignored, however, is that the process of obtaining a search warrant, particularly in the middle of the night, will involve a significant delay. Obtaining a search warrant in the middle of the night in Cape Girardeau County involves an average delay of approximately two hours. J.A. 52-54, 70. During this delay, the most probative and reliable evidence is being destroyed. Obviously, the more quickly a blood sample is secured, the more accurately the results will reflect the actual level of intoxication at the time of driving. Other courts have correctly rejected the contention that the ability of the officer to apply for a search warrant diminishes the exigency in quickly securing blood alcohol evidence during a drunk driving investigation.

In *State v. Machuca*, 227 P.3d 729 (Or. 2010), for example, the Oregon Supreme Court flatly rejected an approach that would have required the State to prove it could not have obtained a search warrant without sacrificing blood alcohol evidence. Reiterating that the evanescent nature of a suspect's blood alcohol content is an exigent circumstance that will ordinarily permit a warrantless blood draw, the Court properly concluded that the focus should be on the exigency created by blood alcohol dissipation, not on the speed with which a warrant could presumably be obtained. *Id.*, at 736. While acknowledging that there may be rare instances where a search warrant could be both obtained and executed in a timely fashion, the Court found that the "mere possibility . . . that such situations may occur from time to time does not

justify ignoring the inescapable fact that, in every such case, evidence is disappearing and minutes count." *Id.* Reaffirming its prior holding in *Milligan, supra*, 748 P.2d 130, the Court concluded that "when probable cause to arrest for a crime involving the blood alcohol content of the suspect is combined with the undisputed evanescent nature of alcohol in the blood, those facts are a sufficient basis to conclude that a warrant could not have been obtained without sacrificing the evidence." *Id.*

Similarly, the Minnesota Supreme Court recognized that "a warrantless search is justified based on the imminent destruction of evidence when there is the potential loss of evidence during the delay necessary to obtain a warrant." *Shriner*, 751 N.W.2d 538, 548. The Court properly rejected the contention that it is the length of delay in obtaining a search warrant that determines the exigency. *Id.* Instead, the ongoing, actual loss of blood alcohol evidence is what controls. The Court further found that requiring an officer in the field to speculate on a range of factors outside of his or her control regarding how much time it would take to obtain a search warrant would place an unreasonable burden on law enforcement. For instance, the Court noted that the officer in the field has no control over how long it would take to travel to a judge or the judge's availability, nor will the officer know the amount of alcohol the suspect consumed or the time of the suspect's last drink. Additionally, the Court pointed out that the officer will not know how long it will take to obtain the blood sample once the

suspect is brought to the hospital. *Id.*, at 549. The Court concluded that it would be unreasonable to call upon the officer in the field to "speculate on each of these considerations and predict how long the most probative evidence of the defendant's blood-alcohol level would continue to exist before a blood sample was no longer reliable." *Id.*

The Minnesota Supreme Court also rejected the contention that the availability of telephonic search warrants diminished the exigency. Noting that telephonic search warrants still require documentation, the Court found that an officer facing the need for a telephonic search warrant could not reasonably be expected to know how much delay would be caused by following the procedures necessary to obtain such a warrant.[17] The Court concluded that exigent circumstances still existed because "during the time taken to obtain a telephonic warrant, it is undisputed that the defendant's body is rapidly metabolizing and dissipating the alcohol in the defendant's blood." *Id.*, at 549.

Similarly, the Fourth Circuit rejected the argument that the availability of a procedure to obtain a search warrant over the telephone diminished the exigency in drunk driving cases. In *United States v.*

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[17] Telephonic search warrants are not available in Missouri. Search warrants in Missouri are governed by Mo. Rev. Stat. § 542.276 (2010), which requires the application, the warrant, and any accompanying affidavit to be in writing. Section 542.276.3 specifically prohibits oral testimony from being considered.

Reid, 929 F.2d 990 (4th Cir. 1991), the Fourth Circuit examined the intricate requirements of obtaining such a warrant and wisely concluded that the availability of this procedure did not alter the exigency of the situation. *Id.*, at 993. Among other requirements involved in obtaining a telephonic search warrant, the Court noted that the arresting officer must prepare a document before calling the magistrate judge, read the document verbatim to the judge, and then wait for the judge to enter what was just read to him verbatim onto another document. The Court observed "[o]bviously, compliance with these rules takes time. Time is what is lacking in these circumstances." *Id.* Because alcohol is eliminated from the body at a constant rate, the Court concluded exigent circumstances existed. *Id.*

Obviously, obtaining a search warrant in the middle of the night takes time. If the arresting officer had sought a search warrant in the case under review, there would have been a delay of approximately two hours. This is a delay that can reasonably be expected. Indeed, this Court has recognized that two hours is "a time period . . . reasonably necessary for the police, acting with diligence, to obtain [a] warrant." *Illinois v. McArthur*, 531 U.S. 326 (2001). During this inevitable delay, the best and most probative evidence of the crime would have continued to be destroyed with each and every minute that passed. Under these circumstances, it was reasonable for the arresting officer to secure evidence of Respondent's

intoxication without first seeking to obtain a search warrant.

C. *Schmerber* cautioned against much more invasive bodily intrusions or intrusions made in an unreasonable manner

The Missouri Supreme Court interpreted *Schmerber* to require additional facts, beyond the natural dissipation of alcohol in the bloodstream, in order to justify a warrantless blood draw. Asserting that *Schmerber* was limited to its "special facts," the Court maintained there must be an accident resulting in physical injuries in order to establish exigent circumstances in a drunk driving investigation. To support this narrow reading, the Court relied extensively on language in *Schmerber* that it understood to be an explicit warning against expansive interpretations:

> It bears repeating, however, that we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.

Pet. App. 18a-19a (quoting *Schmerber*, 384 U.S., at 772). The Missouri Supreme Court's reliance on what

it understood to be an "explicit warning against expansive interpretations" is misplaced.[18] This "explicit warning" was directed at the nature of the bodily intrusion itself, not on the underlying facts of the drunk driving arrest. In the paragraph immediately preceding this "explicit warning," *Schmerber* emphasized that the intrusion at issue, the simple blood test, was performed in a reasonable manner. *Schmerber*, 384 U.S., at 771-772. Approving the blood test because it was taken by a physician in a hospital environment according to accepted medical practices, *Schmerber* proceeded to warn against procedures which might not be safe:

> We are thus not presented with the serious questions which would arise if a search involving use of a medical technique, even of the most rudimentary sort, were made by other than medical personnel or in other than a medical environment – for example, if it were administered by police in the privacy of the stationhouse. To tolerate searches under these conditions might be to invite an unjustified element of personal risk of infection or pain.

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[18] In contrast, the Minnesota Supreme Court, interpreting this exact same language, correctly concluded that this warning "is properly analyzed as indicating that *Schmerber* should not be viewed as authorizing the police to take warrantless blood draws in circumstances other than when they suspect a person of drunk driving." *Shriner*, 751 N.W.2d, at 547 n.9.

Id. *Schmerber* thus made it clear that blood tests performed by unqualified personnel in non-medical settings would not be tolerated. *Schmerber* made it equally clear that other, more invasive, bodily intrusions would likewise not be tolerated.

In *Winston v. Lee*, 470 U.S. 753 (1985), this Court was confronted with an example of the type of invasive bodily intrusion cautioned against in *Schmerber*. Holding it was unreasonable under the Fourth Amendment to compel a robbery suspect to undergo a surgical operation to recover a bullet that had lodged in his chest, this Court explained that *Schmerber* provides the appropriate framework of analysis for cases involving surgical intrusions beneath the skin. Writing the majority opinion of this Court nearly twenty years after writing the majority opinion in *Schmerber*, Justice Brennan concluded that compelling a suspect to undergo a surgical procedure to recover a bullet was precisely the sort of example of the "more substantial intrusions" cautioned against in *Schmerber*. *Winston*, 470 U.S., at 755. In so holding, this Court reiterated that "*Schmerber* recognized society's judgment that blood tests do not constitute an unduly extensive imposition on an individual's personal privacy and bodily integrity." *Id.*, at 762.

Schmerber clearly cautioned against much more invasive bodily intrusions or intrusions made in an unreasonable manner. As *Schmerber* plainly teaches, however, a blood test "taken in a hospital environment according to accepted medical practices" is a

search conducted in a reasonable manner. *Schmerber*, 384 U.S., at 771. In the case under review, the blood test was taken in accordance with these safeguards. The search was reasonable under the Fourth Amendment.

CONCLUSION

The judgment of the Missouri Supreme Court should be reversed.

Respectfully submitted,

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RESPONDENT'S BRIEF

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STATE OF MISSOURI,

Petitioner,

—v.—

TYLER G. MCNEELY,

Respondent.

ON WRIT OF CERTIORARI TO
THE MISSOURI SUPREME COURT

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STATEMENT OF THE CASE

1. At approximately 2:08 a.m. on October 3, 2010, Respondent Tyler G. McNeely was stopped by Corporal Mark Winder, an officer with the Missouri State Highway Patrol, for traveling 56 mph in a 45 mph zone. J.A. 29-30. According to Winder, Respondent smelled of alcohol, his speech was slurred, and his eyes were glassy and bloodshot. J.A.31. Based on these observations, Winder administered a standard set of field sobriety tests. *Id.* Winder later testified that Respondent performed poorly on each of the tests. Specifically, Winder testified that Respondent was unable to complete the alphabet correctly. *Id.* He exhibited six out of six clues on the horizontal gaze nystagmus test. J.A. 32.[1] He was unable to stand on one leg. *Id.* And, he lost his balance when asked to walk and turn. *Id.* Each of these tests was recorded on a police video that is part of the record in this case. J.A. 43. After administering the field sobriety tests, Winder asked Respondent to submit to a breath test using a portable device. Respondent declined, and he was then placed under arrest for driving while intoxicated in violation of Mo. Rev. Stat. § 577.010. J.A. 33.

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[1] Horizontal gaze nystagmus refers to an involuntary jerking of the eye as it moves from side to side. Officers administering the nystagmus test are trained to observe tiny, uncontrollable eye contractions that indicate possible intoxication. Joseph E. Manno, et al., *Experimental Basis of Alcohol-Induced Psychomotor Performance Impairment*, *in* James C. Garriott, Medicolegal Aspects of Alcohol (James C. Garriott ed., 5th ed. 2008), at 347, 357. Because depressant drugs such as alcohol affect motor control of the eye, intoxicated individuals are unable to smoothly move their eyes from left to right while focusing on an object. *Id.*

Once Respondent had been placed in the patrol car, Winder asked him whether he would submit to a breath test at the police station. *Id.* When Respondent again declined, Winder took him directly to St. Francis Hospital. J.A. 33-34. Reading from Missouri's implied consent form, Winder informed Respondent that he had been arrested for driving while intoxicated and asked him whether he would submit to a blood test.[2] Respondent was also told that his driver's license would be immediately revoked for one year if he refused the blood test, and that evidence of his refusal could be used against him in a future prosecution. J.A. 34-35. Understanding the consequences of his refusal, Respondent chose not to consent. J.A. 35, 59.[3]

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[2] Although drawing an individual's blood and testing its contents are two distinct processes, Respondent adopts the convention of the lower courts for purposes of this brief and uses the terms "blood draw" and "blood test" interchangeably to refer to the process of taking an individual's blood, unless otherwise indicated. Both the blood draw and the blood test are searches under the Fourth Amendment. *See Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616 (1989).

[3] Pursuant to Mo. Rev. Stat. § 577.020, '[a]ny person who operates a motor vehicle upon the [Missouri] public highways ... shall be deemed to have given consent to ... a chemical test or tests of the person's breath, blood, saliva or urine for the purpose of determining the alcohol or drug content of the person's blood." § 577.020.1. Missouri law also provides that this statutory consent can be withdrawn. Before the police may rely on the implied consent law to test someone who has been arrested for drunk driving, they must therefore inform the driver of the reason why they are requesting the test, that evidence of the driver's refusal to submit to the test "may be used against him," and that his driver's license shall be immediately revoked if he refuses to take the test. § 577.041.1. At that point, the driver may withdraw consent immediately or request 20 minutes to consult with an attorney. *Id.*

Winder then directed hospital personnel to administer the blood test over Respondent's objection and without a court order. J.A. 35. The blood test was administered at 2:33 a.m., J.A. 36, 59, twenty-five minutes after Respondent's car was initially stopped. Respondent was handcuffed throughout the procedure and his arms were restrained. Following the blood draw, Respondent was taken to jail where he received written notice that his license would be revoked for a year pursuant to Missouri's implied consent law because of his refusal to submit to breath and blood tests. J.A. 73. Respondent's blood alcohol content (BAC) was measured at 0.154. J.A. 60.[4]

2. Respondent filed a pretrial motion to suppress the results of the blood test, arguing that the compulsory blood draw without either a warrant or consent violated his rights under the Fourth

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In either event, once the driver makes clear that he will not submit to the test or tests, "the officer shall ... serve the notice of license revocation personally upon the [driver] and shall take possession of any license to operate a motor vehicle issued by [Missouri] which is held by that person." *Id.* Having been stripped of his license on the spot, the driver is given a 15-day temporary permit and notice of his right to file a petition for review to contest the license revocation. *Id.*

A driver arrested for drunk driving who refuses to submit to testing has his license revoked for one year, even for a first drunk driving arrest. § 577.041.3. By contrast, a driver who agrees to be tested and has a BAC over .08 has his license suspended for 30 days, § 302.525.2(1), unless he has been arrested for another drunk driving offense within the past five years. § 302.525.2(2).

[4] The BAC measurement refers to grams of alcohol per deciliter of blood.

Amendment. J.A. 25.[5] After reciting the details of Respondent's arrest, Winder was asked on cross-examination whether there was "any particular exigent circumstance as you understand that from your training or emergency circumstance that dictated the need to immediately get blood from Mr. McNeely." J.A. 40. Winder's answer was "No." *Id.* Winder was then asked whether he had made any effort to contact the prosecuting attorney following Respondent's arrest to determine whether or not a warrant could be obtained in timely fashion. J.A. 41. His answer, again, was "No." *Id.* That answer led to the following exchange:

> Q. On that night were you aware that or were you aware whether or not there was a prosecuting attorney on call?
>
> A. I'm sure there was.
>
> Q. Okay. In your time as a highway patrolman, have you obtained search warrants to obtain blood from people that have been arrested for driving while intoxicated?
>
> A. Yes.
>
> Q. And it's correct, is it not, that there's basically a form that the prosecutor of this county has prepared for use by officers to fill out for an affidavit?
>
> A. Yes.

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[5] Respondent's suppression motion also raised a claim under Article I, Section 15 of the Missouri Constitution, which likewise prohibits unreasonable searches and seizures. The Missouri courts did not rule on that state constitutional claim and it is not at issue here.

Q. Have you filled those out before?

A. Yes.

Q. Let me show you what we've got marked as Defendant's Exhibit B [J.A. 61-69]. Is that the type of form that you're familiar with?

A. Yes.

Q. And are those available to you at the sheriff's department?

A. Yes, they're readily available.

Q. In the 17 and a half years that you've been a highway patrolman, do you have an estimate for us of the number of times that you've had to obtain a search warrant to get blood from a person arrested for driving while intoxicated?

A. Probably less than ten.

Q. On any of the times in your training or in your experience when you have wanted to get a search warrant, have you been unable to because of the unavailability of a prosecuting attorney?

A. No.

Q. Have you ever been unable to because of the unavailability of a judge?

A. No.

Q. On this particular night, did you have any reason to believe that you couldn't have gotten a search warrant because of the unavailability of a prosecutor or the unavailability of a judge?

A. No.

J.A. 41-42.

Finally, when asked why he had chosen not to seek a search warrant in this case when he had obtained search warrants in the past under similar circumstances without difficulty, Winder explained that he had read an "opinion piece" written by a prosecutor in the Missouri Attorney General's Office indicating that search warrants were no longer necessary as a result of a change in Missouri's implied consent law. J.A. 39-40.[6]

The only other witness at the suppression hearing was Sergeant Blaine Adams, a supervisor with the Missouri State Highway Patrol. He testified that he had received conflicting advice about the new language of the implied consent law and its impact on police practices. J.A. 49-51. On the one hand, the Highway Patrol had prepared a memorandum "suggest[ing], after detailed legal review, [that warrantless and non-consensual blood draws] only be used in exigent circumstances and then only on manslaughter/vehicular assault cases with serious physical or disabling injuries, after expending all

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[6] Several months before Respondent's arrest, the state legislature removed the words "then [no chemical test] shall be given" from the state law section discussing the significance of a suspect's refusal to consent to a blood test. § 577.041. The State's contention that this statutory change authorized warrantless blood draws in all DWI cases was not addressed by the Missouri Supreme Court, which wrote: "Because the warrantless blood draw in this case was a violation of Defendant's Fourth Amendment right to be free from unreasonable searches, there is no need to address the State's arguments based on Missouri's implied consent law." Pet. App. 21a n.9.

reasonable means to obtain a search warrant." J.A. 71-72. On the other hand, the County Prosecutor's office had taken the position that warrants were more critical in serious accident cases than in run-of-the-mill DWI arrests. J.A. 56. Neither his superiors at the Highway Patrol nor the County Prosecutor's office advised Sergeant Adams that police officers could or should ignore the warrant requirement in all DWI cases.

Sergeant Adams also testified that there was a 91% probability, based on studies he had read, that someone who shows four or more "clues" out of a total of six on the horizontal gaze nystagmus test has a blood alcohol level of .08 or higher. J.A. 47. And, while he testified that it generally takes "about two hours" to obtain a search warrant in Cape Girardeau County, J.A. 54, an exhibit introduced without objection from the prosecution documented six recent cases in which search warrants authorizing blood draws had been obtained in less than an hour. J.A. 70. In five of the cases, the time period from application to warrant was less than 30 minutes. *Id.*

3. Respondent's motion to suppress was granted by the trial court. Pet. App. 39a-46a. In an opinion that carefully considered and distinguished this Court's decision upholding a warrantless and non-consensual blood draw in *Schmerber v. California*, 384 U.S. 757 (1966), the trial judge explained:

> The facts [in this case] are substantially different than the facts in *Schmerber*. There was no accident. There was no investigation at the scene of the stop other than the field sobriety tests, which took

> less than ten minutes. The defendant was not injured and did not require emergency medical treatment. This was not an emergency, it was a run of the mill driving while intoxicated case. As in all cases involving intoxication, the Defendant's blood alcohol was being metabolized by his liver. However, a prosecutor was readily available to apply for a search warrant and a judge was readily available to issue a warrant. *Schmerber* is not applicable because the "special facts" of that case, the facts which established the exigent circumstances, did not exist in this case to justify the warrantless search.

Pet. App. 43a.

4. The Missouri Court of Appeals construed *Schmerber* differently. Pet. App. 23a-38a. In its view, *Schmerber* broadly authorizes a warrantless and non-consensual blood test whenever the police have probable cause to arrest someone for drunk driving, without regard to any other "special facts." Pet. App. 33a. Rather than reverse the trial court, however, the court of appeals transferred the case to the Missouri Supreme Court (rendering its opinion entirely advisory), "in light of the general interest and importance of the issues involved." Pet. App. at 24a.

5. The Missouri Supreme Court unanimously affirmed the trial court's ruling. Pet. App. 1a-22a. Noting that warrantless searches are *per se* unreasonable unless they fall within certain narrow exceptions, the Missouri Supreme Court weighed society's interest in preventing drunk driving against

the defendant's Fourth Amendment interest in freedom from unreasonable searches and concluded that the fact that the blood alcohol level dissipates over time does not alone, and without regard to other factors, qualify as an exigent circumstance under *Schmerber*. Pet. App. 2a-3a, 20a-22a. Disagreeing with the State's contention that *Schmerber* established a categorical rule applicable to all DWI cases, the Missouri Supreme Court ruled that the determination of whether exigent circumstances exist must be made on a case-by-case basis. Pet. App. 20a. "Because there was no accident to investigate and there was no need to arrange for the medical treatment of any occupants," Pet. App. 3a, the court found on the facts of this case that "there was no delay that would threaten the destruction of evidence before a warrant could be obtained." *Id.* "Additionally," the court noted, "there was no evidence here that the patrolman would have been unable to obtain a warrant had he attempted to do so." *Id.*

6. On March 6, 2012, the State's motion for rehearing was denied without dissent. Pet. App. 47a.

SUMMARY OF ARGUMENT

Drunk driving is a serious problem and a cause for serious concern. The issue in this case, however, is not whether drunk drivers can be removed from the road to promote public safety. Under Missouri law, Respondent's license was immediately revoked for one year when he refused to consent to either a breath or blood test following his arrest. Similar laws exist throughout the country.

Nor does this case present the issue of whether the police can ever, under any circumstances, require

someone arrested for drunk driving to submit to a warrantless and non-consensual blood test. *Schmerber* upheld such a test and Respondent does not ask this Court to overrule *Schmerber*, properly construed.

The issue in this case is whether the police can compel a warrantless blood test in *every* DWI case, even when the "special facts" identified in *Schmerber* are missing, and even when there is no reason to believe that a search warrant could not be obtained in a timely fashion. Petitioner's effort to stretch *Schmerber* that far cannot be reconciled with the language of *Schmerber* itself, or with this Court's Fourth Amendment jurisprudence more generally.

This Court has repeatedly emphasized the importance of the warrant requirement, especially in the criminal context. This Court has also repeatedly stressed that *per se* exceptions to the warrant requirement are disfavored. Thus, while the Court has recognized the destruction of evidence as an exigent circumstance that can justify an exception to the warrant requirement, it has typically required at the same time that the existence of exigent circumstances be determined on a case-by-case basis rather than categorically. *Richards v. Wisconsin*, 520 U.S. 385 (1997). That is especially true when heightened privacy interests are at stake. Invasions of the home are one example; intrusions on bodily integrity are another.

More specifically, whether a warrantless blood test is unreasonable in any given case should be determined based on the totality of circumstances, including: whether there was anything that delayed the officers at the arrest scene, such as an accident or

injury; whether there was more than one officer at the scene; how far the police had to travel to a hospital (or other site where the blood was drawn); what the warrant procedures are in the particular state; how long it typically takes to obtain a warrant in the jurisdiction; whether and how the interval between time of arrest and time of testing affects the admissibility of BAC evidence under state evidentiary rules; and whether the officer(s) made any effort at all to obtain a warrant. All these facts are or should be well known to local police and magistrates.

Petitioner's argument in favor of a *per se* rule that would allow warrantless blood tests whenever there is a probable cause arrest for drunk driving purports to be based on a totality-of-the circumstances test. The State employs a version of the totality-of-the circumstances test, however, that relies on categorical balancing rather than fact-specific determinations. Such categorical balancing would be more appropriate if this were a "special needs" case where the State's primary interest was unrelated to traditional law enforcement concerns. It is not. This is a criminal case and the State's interest in obtaining Respondent's blood sample is to secure his criminal conviction.

In any event, Petitioner overstates the need for warrantless blood tests, and understates the affront to personal privacy and dignity when the States overrides an individual's objection and sticks a needle in his arm.

When assessing need in other Fourth Amendment contexts, the Court has looked at the practice of other states as an objective measure.

Here, the fact that approximately half of all states prohibit the warrantless blood draw that took place in this case undermines Missouri's argument that it served a compelling need. There is no reason to believe that other states are less concerned than Missouri about the problem of drunk driving, or have been less successful in prosecuting DWI cases.

Different states also have different procedures for obtaining search warrants. Since *Schmerber* was decided more than 60 years ago, it has become far more common for states (and the federal government) to permit telephonic warrant applications. *See Steagald v. United States*, 451 U.S. 204 (1981). With rapidly evolving technology, electronic applications are likewise increasing. As the time needed to obtain a search warrant decreases, the argument in favor of warrantless blood tests diminishes as well. This Court should not adopt a *per se* Fourth Amendment rule based on assumptions about the time needed to obtain a search warrant when that time can and does vary from jurisdiction to jurisdiction, and where technology continues to increase the speed with which warrants can be obtained. Nor should the Court adopt a Fourth Amendment rule that discourages states from expediting their warrant processes.

Similarly, states have adopted a checkerboard set of rules about the admissibility of "retrograde extrapolation" evidence. The theory of retrograde extrapolation is that it is possible to work backwards from the time of testing to determine a driver's blood alcohol level at the time of arrest. A few states categorically exclude it, most do not, and some apparently have not yet taken a position. Serious

questions have been raised regarding the reliability of such evidence, but this case is not the occasion for the Court to consider those questions. The argument that critical evidence will be destroyed unless the State preserves the right to engage in warrantless blood tests in all cases necessarily has less force in states that permit retrograde extrapolation to be considered by the fact-finder. The *per se* rule that Petitioner promotes would ignore those distinctions as well.

The natural dissipation of alcohol in the blood is also very different than other cases where the Court has worried about the destruction of evidence. On the one hand, as Petitioner points out, the dissipation of alcohol is natural and inevitable. On the other hand, it is not the "now or never" situation that the Court has confronted in other cases, *see Roaden v. Kentucky*, 413 U.S. 496, 504 (1973), for at least two reasons. First, once drugs are flushed down the toilet, they are gone instantly and forever. The dissipation of blood, by contrast, is gradual and predictable. For example, Respondent's blood alcohol level was 0.154 when he was tested 25 minutes after his arrest. Using commonly accepted dissipation rates, it would have been almost 4 hours before his BAC was below legal limits. Second, once drugs are flushed down the toilet, the prosecution's case often disappears with them. That is not so in DWI cases. Someone who fails the field sobriety tests still faces a substantial likelihood of conviction, and that likelihood is further increased by the fact that most states, including Missouri, permit an adverse inference to be drawn from the defendant's refusal to submit to a breath or blood test.

Petitioner's effort to minimize the privacy invasion on the other side of the scale is unpersuasive. To be sure, the Court stated in *Schmerber* that blood tests are routine and generally safe, but that comment must be understood in context. This Court's cases recognize a spectrum of privacy interests. A blood test may not be as invasive as the surgical operation to remove a bullet that this Court considered in *Winston v. Lee*, 470 U.S. 753 (1985), or the stomach pump at issue in *Rochin v. California*, 342 U.S. 165 (1952). Still, this Court's cases leave little doubt that any bodily intrusion represents a significant invasion of privacy. Moreover, very few people have their blood taken while they are handcuffed and subject to restraint by the police.

In short, this Court properly rejected a *per se* rule in *Schmerber* and should do so again. Petitioner argues that a *per se* rule is easier for the police to apply. Even if true, "the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment." *Mincey v. Arizona*, 437 U.S. 385, 393 (1978). Petitioner's argument also begs the question of whether its *per se* rule allows exceptions to the warrant requirement that are not justified by exigent circumstances. If so, the *per se* rule cannot be sustained under the Fourth Amendment. *Arizona v. Gant*, 556 U.S. 332 (2009). Reasoned judgment is an inescapable part of the Fourth Amendment's reliance on a reasonableness standard. *Maryland v. Wilson*,

519 U.S. 408, 422-23 (1997) (Kennedy, J., dissenting).[7]

On the facts of this case, there is no reason to disturb the finding of the Missouri state courts that the police failed to carry their burden of proving exigent circumstances. *Minnesota v. Olson*, 495 U.S 91, 100 (1990). According to everyone involved, this was a run-of-the-mill stop. There was no accident and there were no injuries. The arresting officer testified that he had obtained warrants in the past under similar circumstances without any difficulty, that his decision not to seek a warrant in this case was prompted by a legal opinion he had read rather than any sense of urgency informed by his prior experience, both a prosecutor and a judge were on call, and the record revealed that warrants could be obtained expeditiously, even during nighttime.

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[7] Should the Court decide that *Schmerber* did announce a *per se* rule authorizing warrantless blood tests in all DWI cases, the Court should now modify that holding in favor of a totality-of-the-circumstances test. The Court has proven its willingness to revisit *per se* rules when subsequent experience reveals that the factual assumptions underlying the rule are invalid. *See Gant*, 556 U.S. at 341. As demonstrated below, technological developments since *Schmerber* have altered the legal landscape in many states by reducing the time needed to obtain a warrant and increasing the time available to obtain an admissible blood test result. Those changes, and the disparate state practices they have produced, undermine any rationale for a *per se* rule.

ARGUMENT

I. *PER SE* EXCEPTIONS TO THE WARRANT REQUIREMENT ARE RARELY PROPER AND RARELY UPHELD.

Petitioner urges this Court to adopt a *per se* rule authorizing warrantless blood draws in *all* DWI cases based solely upon a police officer's determination of probable cause. This Court's Fourth Amendment jurisprudence takes the opposite approach: it favors a judicial role under the Fourth Amendment and disfavors *per se* exceptions to the warrant requirement.

A. The Warrant Requirement Plays A Critical Role In Protecting Personal Privacy.

The Court's classic statement regarding the warrant requirement was written more than 60 years ago:

> The point of the Fourth Amendment, which is often not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Johnson v. United States, 333 U.S. 10, 13-14 (1948). *See also Coolidge v. New Hampshire*, 403 U.S. 443, 449 (1971).

Accordingly, "it is a cardinal principle that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Mincey v. Arizona*, 437 U.S. at 390 (internal quotations omitted)(citing *Katz v. United States*, 389 U.S. 347, 357 (1967)). *See also Georgia v. Randolph*, 547 U.S. 103, 109 (2006) (exceptions to warrant requirement "jealously and carefully" drawn) (citing *Jones v. United States*, 357 U.S. 493, 499 (1958)) (quotations omitted).

More is typically required than an officer's determination of probable cause to justify a warrantless search. "Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the [Fourth] Amendment to a nullity." *Johnson v. United States*, 303 U.S. at 14. *See also Vale v. Louisiana*, 399 U.S. 30, 34 (1970); *Katz v. United States*, 389 U.S. at 357.

This Court has also recognized that the warrant requirement has special force when the privacy interests at stake lie at the core of the Fourth Amendment. The home is one example. *Payton v. New York*, 445 U.S. 573 (1980)("The physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."); *Kyllo v. United States*, 533 U.S. 27, 31 (2001) ("At the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.") (citing *Silverman v. United States*, 365 U.S. 505, 511 (1961) (quotations omitted)).

Bodily intrusions are another example. As the Court stated in *Schmerber*, 384 U.S. at 770, "warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned." *See also Winston v. Lee*, 470 U.S. at 760 (intrusions into the human body implicate the "most personal and deeply rooted expectations of privacy").

B. *Per Se* Exceptions To The Warrant Requirement Are Generally Disfavored.

When reviewing the constitutionality of warrantless searches, the Court has engaged in a balancing process, weighing the individual's privacy interests against the degree to which a warrantless search is necessary to advance legitimate government interests. *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999). However, the Court has repeatedly cautioned in conducting that inquiry that "[t]here is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances." *Ker v. California*, 374 U.S. 23, 33 (1963)) (citations and quotations omitted).

Thus, "for the most part *per se* rules are inappropriate in the Fourth Amendment context." *United States v. Drayton*, 536 U.S. 194, 201 (2002). As the Court explained in *Ohio v. Robinette*, 519 U.S. 33, 39 (1996):

> In applying [the reasonableness] test we have consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry. Thus, in *Florida v. Royer*, 460 U.S. 491 (1983), we expressly disavowed any "litmus-paper test" or single "sentence or

> ... paragraph ... rule," in recognition of the "endless variations in the facts and circumstances" implicating the Fourth Amendment. *Id.* at 506. Then, in *Michigan v. Chesternut*, 486 U.S. 567 (1988), when both parties urged "bright-line rule[s] applicable to all investigatory pursuits," we rejected both proposed rules as contrary to our "traditional contextual approach." *Id.* at 572–573. And again, in *Florida v. Bostick*, 501 U.S. 429 (1991), when the Florida Supreme Court adopted a *per se* rule that questioning aboard a bus always constitutes a seizure, we reversed, reiterating that the proper inquiry necessitates a consideration of "all the circumstances surrounding the encounter." *Id.*, at 439.

"[L]largely avoiding categories and protocols for searches," *United States v. Banks*, 540 U.S. 31, 36 (2003), the Court has instead

> treated reasonableness as a function of the facts of cases so various that no template is likely to produce sounder results than examining the totality of circumstances in a given case; it is too hard to invent categories without giving short shrift to details that turn out to be important in a given instance, and without inflating marginal ones.

Id. (citations omitted). *See also Ker v. California*, 374 U.S. at 33 ("standards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application"); *Go-Bart Importing Co. v.*

United States, 282 U.S. 344, 357 (1931); *United States v. Rabinowitz*, 339 U.S. 56 (1950).

Petitioner's argument in favor of a *per se* rule purports to be an application of the totality-of-the-circumstances test, but the version of that test that Petitioner applies leaves no room to consider the actual facts of a particular case. Pet. Br. at 28-42. Even as a form of categorical balancing, Petitioner's argument is unpersuasive. *See* Point II, *infra*. More fundamentally, this Court has recognized that the reasonableness of any search under the Fourth Amendment is, in most cases, a fact-specific determination.

C. The Exigent Circumstances Exception To The Warrant Requirement Reflects The Court's Preference For A Totality-Of-The-Circumstances Test.

As Petitioner correctly notes, this Court has held that the potential destruction of evidence may constitute an exigent circumstance justifying a warrantless search. *Kentucky v. King*, 131 S. Ct. 1849, 1856-57 (2011). But, this Court has also warned against the adoption of *per se* rules in cases involving the potential destruction of evidence.

Most notably, in *Richards v. Wisconsin*, 520 U.S. 385 (1997), the Court rejected a blanket exception to the knock-and-announce rule in all felony drug cases. The Court acknowledged that such cases often pose a threat of physical violence and a risk that evidence could be destroyed if the suspect were alerted to the presence of the police. The Court further acknowledged that such considerations could justify an exception to the knock-and-announce rule on particular facts.

Indeed, the Court found that the facts presented in *Richards* warranted an exception. Nevertheless, the Court ruled that the Fourth Amendment required a "case-by-case evaluation," *id.* at 392, because the facts justifying a no-knock search might not be present in every felony drug case.

Richards is consistent with the approach that this Court has taken in other exigent circumstances cases. For example, in *Warden v. Hayden*, 387 U.S. 294, 298 (1967), the Court carefully reviewed the facts before concluding, "[u]nder the circumstances of this case," that the police were engaged in hot pursuit of a dangerous felon when they entered a home without a warrant, and therefore did not violate the Fourth Amendment. Similarly, in *Brigham City, Utah v. Stuart*, 547 U.S. 398, 406 (2006), the Court held that police officers acted reasonably "under the circumstances" when they entered a home without a warrant based on a reasonable belief that someone inside might be seriously injured. And, the Court's decision to uphold the admissibility of fingernail scrapings taken without a warrant and without consent in *Cupp v. Murphy*, 412 U.S. 291 (1973), emphasized the fact that, after refusing to consent to fingernail samples, Cupp "put his hands behind his back and appeared to rub them together. He then put his hands in his pockets, and a 'metallic sound, such as keys or change rattling' was heard." *Id.* at 296.

Numerous other cases have likewise applied a totality-of-the-circumstances test when weighing a claim of exigent circumstances. *See, e.g., United States v. Banks*, 540 U.S. 31 (2003)(15 to 20-second wait before forcible entry reasonable where officers had reasonable suspicion to believe suspect might

destroy drugs); *Minnesota v. Olson*, 495 U.S. 91 (1990) (warrantless home entry unreasonable where suspect allegedly played minor role in murder); *Welsh v. Wisconsin*, 466 U.S. 740 (1984) (warrantless home entry unreasonable in part because suspect arrested on nonjailable DWI offense); *Mincey v. Arizona*, 437 U.S. at 393-94 (finding no exigent circumstances for a warrantless home entry where there was no indication that evidence would be destroyed and no showing that police lacked sufficient opportunity to obtain warrant); *Ker v. California*, 374 U.S. 23, 40 (1963) (upholding warrantless entry into the home of an individual suspected of marijuana possession because of reasonable fear that evidence would be destroyed but cautioning that the decision was based on "the particular circumstances of this case"); *see also Chimel v. California*, 395 U.S. 752 (1969)(search of arrestee's entire house incident to arrest unreasonably extended beyond the area under the arrestee's control).

There is no reason for the Court to adopt a different approach here. Whether a warrantless blood test is unreasonable in any given case should be determined based on the totality of circumstances, including: whether there was anything that delayed the officers at the arrest scene, such as an accident or injury; whether there was more than one officer at the scene; how far the police had to travel to a hospital (or other site where the blood was drawn); what the warrant procedures are in the particular state; how long it typically takes to obtain a warrant in the jurisdiction; whether and how the interval between time of arrest and time of testing affects the admissibility of BAC evidence under state

evidentiary rules; and whether the officer(s) made any effort at all to obtain a warrant. Each of these facts is or should be well known to local police and magistrates.

Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989), is not to the contrary. Although the Court in that case categorically upheld compulsory drug and alcohol tests for railway workers after "major accidents," it was careful to note that the testing program in *Skinner* was designed to address "'special needs' beyond normal law enforcement." *Id.* at 620. This is not a "special needs" case. As Justice Kennedy stated in *Ferguson v. City of Charleston*, 532 U.S. 67, 898 (2001)(Kennedy, J., concurring): "The traditional warrant and probable cause requirements are waived in our [special needs] cases on the explicit assumption that the evidence obtained in the search is not intended to be used for law enforcement purposes."

Petitioner argues that a categorical exception to the warrant requirement is nonetheless appropriate in *all* DWI cases because the destruction of evidence is inevitable in *every* case. There is a crucial difference, however, between inevitable and immediate when determining whether the police face a genuine emergency. The exigent circumstances exception only applies when the exigency makes it impracticable to secure a warrant. Thus, the relevant question is not whether alcohol in the blood will dissipate over time. It is whether there is time to obtain a warrant that safeguards the defendant's constitutional interest in bodily integrity and personal dignity without unduly impeding the state's ability to prosecute its case. Because there is no

categorical answer to that question, *see* Point II, *infra*, a *per se* exception to the warrant requirement is neither necessary nor appropriate.

Where the answer to the balancing question does lead to a categorical answer, the Court has on occasion recognized *per se* exceptions to the warrant requirement based on exigent circumstances. For example, the police may conduct a search incident to a lawful arrest without a warrant, *Chimel v. California*, 395 U.S. 752 (1969), and cars stopped on the highway with probable cause may be subject to a warrantless search, *Carroll v. United States*, 267 U.S. 132 (1925). But those exceptions do not assist Petitioner here.[8]

First, both exceptions have a long history that is lacking for warrantless blood draws. In *United States v. Robinson*, 414 U.S. 218, 224 (1973), the Court observed that "the validity of the search of a person incident to a lawful arrest has been regarded as settled from its first enunciation." The automobile exception is likewise rooted in the Court's historical treatment of a movable vehicle as a *per se* exigent

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[8] Although there is language in *Schmerber* referring to the warrantless blood draw as a search incident to arrest, 384 U.S. at 771, the Court has never treated *Schmerber* as a simple search-incident-to-arrest case. *E.g. Georgia v. Randolph*, 547 U.S. 103, 116 n.6 (2006) (treating *Schmerber* and *Chimel* as separate exceptions to the warrant requirement). As *Schmerber* itself noted, the considerations supporting searches incident to arrest are of little moment with regard to "intrusions beyond the body's surface." *Id.* at 769. In addition, the blood draws at issue in *Schmerber* and this case were not contemporaneous with arrest. Had the Court regarded the blood draw in *Schmerber* as nothing more than a search incident to arrest, there would have been no need for the Court's extended discussion of the "special facts" in that case.

circumstance authorizing police to seize and search the vehicle. *See California v. Acevedo*, 500 U.S. 565, 569 (1991)(tracing historical roots of the automobile exception to 18th century treatment of movable vehicles).

Second, the Court has held that the driver of a car has a diminished expectation of privacy in his vehicle. *Rakas v. Illinois*, 439 U.S. 128, 153-54 (1978). Someone who has just been arrested has a diminished expectation of privacy, as well, when the police search his person and the immediately surrounding vicinity looking for weapons that might threaten the safety of the arresting officers. *United States v. Robinson*, 414 U.S. at 228. A violation of bodily integrity raises privacy interests of a wholly different magnitude.

Finally, the law enforcement interests served by the automobile exception and the exception for searches incident to arrest would be entirely frustrated by the requirement that the police first obtain a warrant. As explained in more detail below, that is not true for warrantless blood draws in every DWI case. *See* Point IIE, *infra*.

This Court's recent decision in *Arizona v. Gant*, 556 U.S. 332 (2009), demonstrates how *per se* exceptions to the warrant requirement are subject to mission creep and why they must be carefully limited. In *New York v. Belton*, 453 U.S. 454 (1981), the Court held that the police may search the entire passenger area of a car as an incident to the arrest of someone driving the car. In *Thornton v. United States*, 541 U.S. 615 (2004), the Court extended the *Belton* rule to someone arrested outside the car. Four years later, the Court reversed course in *Gant*,

holding that the rationale for a search incident to arrest no longer applied once the suspect was handcuffed and inside the police cruiser. Under those circumstances, the Court concluded, "[c]onstruing *Belton* broadly to allow vehicle searches incident to any arrest would serve no purpose except to provide a police entitlement, and it is anathema to the Fourth Amendment to permit a warrantless search on that basis." 556 U.S. at 347.

A warrantless blood draw in the absence of true exigency is, for the same reason, "anathema to the Fourth Amendment."

D. *Schmerber* Did Not Establish A Per Se Rule Authorizing Warrantless Blood Draws In All DWI Cases.

The language of *Schmerber* does not support a *per se* exception to the warrant requirement. At the outset, the Court carefully framed the question presented:

> Although the facts which established probable cause to arrest in this case also suggested the required relevance and likely success of a test of petitioner's blood for alcohol, the question remains whether the arresting officer was permitted to draw these inferences himself, or was required instead to procure a warrant before proceeding with the test . . . . The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great.

384 U.S. at 770.

Evaluating the totality of the circumstances to decide whether the officers faced a genuine emergency, the Court recognized that alcohol naturally dissipates from the blood, but did not rest its decision on that fact alone. *Id.* at 770-71; *cf. Banks*, 540 U.S. at 36 (Court's totality-of-the-circumstances test has recognized "factual considerations of unusual, albeit not dispositive, significance."). Instead, the *Schmerber* Court wrote:

> *Particularly in a case such as this*, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. *Given these special facts*, we conclude that the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner's arrest.

384 U.S. at 770-71 (emphasis added).

Even more tellingly, the Court ended its opinion with these words:

> We thus conclude that the present record shows no violation of petitioner's right under the Fourth and Fourteenth Amendments to be free of unreasonable searches and seizures. It bears repeating, however, that we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited

> conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.

Id. at 772.

Subsequent decisions from the Court confirm that *Schmerber* applied a totality-of-the-circumstances approach to assess the reasonableness of "intrusions beyond the body's surface." *Id.* at 769. In *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985), *Schmerber* (along with *Cupp*) was included among a list of cases decided on the basis of their "particular facts" under a totality-of-the-circumstances test. In *Winston v. Lee*, the Court explained the holding in *Schmerber* by stating:

> The Fourth Amendment neither forbids nor permits all . . . intrusions [into the human body]; rather, the Amendment's "proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner."

470 U.S. at 760 (quoting *Schmerber*). Applying that standard, the Court then ruled that the Fourth Amendment barred the State from forcing a robbery suspect to undergo surgery to remove a bullet from his chest.

Petitioner contends that once the police have established probable cause, the only variable under *Schmerber* is the manner in which the blood test is conducted. Pet. Br. at 39-41. But the quoted language from *Schmerber* gives equal weight to whether or not a warrantless blood test is "justified in the circumstances." *See also Schmerber*, 384 U.S.

at 768 ("[T]he questions we must decide in this case are whether the police were justified in requiring petitioner to submit to the blood test, and whether the means and procedures employed in taking his blood respected relevant Fourth Amendment standards of reasonableness.").

E. A Totality-of-the-Circumstances Test Would Not Unduly Impede Law Enforcement Interests.

Despite Petitioner's suggestions to the contrary, maintaining the totality-of-the-circumstances test in this case would not unduly impede law enforcement interests. It is of course true that a totality-of-the-circumstances test will require officers to consider a variety of facts potentially affecting their ability to obtain a timely warrant. Yet, this Court has required police to make swift, even life-or-death decisions under far more ambiguous circumstances.

For instance, in *Tennessee v. Garner*, 471 U.S. 1 (1985), the Court held that officers may not use deadly force unless such force is necessary to thwart the suspect's escape and the officer has probable cause to believe the suspect poses a significant threat of death or serious physical injury to the officer or others. Responding to the assertion that a rule limiting the use of deadly force unduly "requires the police to make impossible, split-second evaluations of unknowable facts," the Court noted that police must routinely make difficult judgments with limited knowledge under prevailing Fourth Amendment standards. *Id.* at 20. As one of those difficult judgments, the *Garner* Court cited the stop-and-frisk rules announced in *Terry v. Ohio*, 392 U.S. 1, 20

(1968) (holding that police may stop an individual upon reasonable suspicion that criminal activity is taking place and that police may frisk the individual upon reasonable suspicion that the individual presents a danger to officer or others).

Petitioner and its *amici* argue that a *per se* rule is necessary in this case to remove any uncertainty for police officers about when a warrantless blood draw is permissible. But that objection could be raised in every context in which this Court has held that the constitutionality of police action depends on the totality of circumstances, including cases like *Garner* where life and death are at stake. Moreover, the price of certainty should not be the sacrifice of Fourth Amendment principles that would result from a rule sanctioning warrantless searches in the absence of truly exigent circumstances.

As Justice Kennedy observed in *Maryland v. Wilson*: "The distinguishing feature of our criminal justice system is its insistence on principled, accountable decisionmaking in individual cases. If a person is to be seized, a satisfactory explanation for the invasive action ought to be established by an officer who exercises reasoned judgment under all the circumstances of the case. This principle can be accommodated even where officers must make immediate decisions to ensure their own safety." 519 U.S. at 422 (1997) (Kennedy, J., dissenting).

II. THE *PER SE* RULE THAT PETITIONER SEEKS IS NOT REASONABLE UNDER THE FOURTH AMENDMENT.

As explained above, this Court has, "for the most part," *United States v. Drayton*, 536 U.S. at 201,

eschewed categorical balancing in deciding whether to apply one of the few "specifically established and well-delineated exceptions" to the warrant requirement, *see Katz v. United States*, 389 U.S. at 357, including the exigent circumstances exception. The Court has instead focused on the particular facts before it in balancing "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion," *United States v. Place*, 462 U.S. 696, 703 (1983). But even judged categorically, a *per se* rule authorizing warrantless blood tests in all DWI cases does not pass the reasonableness test.

Petitioner's argument in favor of a *per se* rule rests on two basic claims. First, evidence of a driver's blood alcohol level is critical to ensure effective DWI enforcement. Second, the warrant requirement is impractical in every case because alcohol naturally dissipates over time within the body. Neither claim supports the *per se* rule that Petitioner is seeking.

A. At Least Half The States Prohibit Warrantless Blood Draws In Run-Of-The-Mill DWI cases.

Petitioner's insistence that blood test evidence is critical in all cases – and justifies an exception to the warrant requirement - is contradicted by the laws in at least half the states that prohibit warrantless blood draws in run-of-the-mill DWI cases.[9]

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[9]Some states have enacted general prohibitions against warrantless blood draws while other states have prohibited warrantless blood draws except in cases involving a death or

"In evaluating the reasonableness of police procedures under the Fourth Amendment," this Court has often "looked to prevailing rules in individual jurisdictions." *Tennessee v. Garner*, 471 U.S. at 15-16 (citing *United States v. Watson*, 423 U.S. 411, 421-22 (1976)). Thus, for example, as support for its holding that the Fourth Amendment prohibits the use of lethal force to apprehend a fleeing felon absent a significant threat of death or serious bodily injury to the officer or others, the Court noted in *Garner* that fewer than half the states had retained the common law rule allowing deadly force against any fleeing felon.[10] Almost exactly the same ratio exists in this case, with about half the states prohibiting warrantless blood draws in either

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serious bodily injury. *See* Ala. Code § 32-5-192(c)); Alaska Stat. Ann. §§ 28.35.032(a), 28.35.035(a); Ariz. Rev. Stat. Ann. § 28-1321(D)(1); Conn. Gen. Stats. Ann. §§ 14-227b(b), 14-227c(b); Fla. Stat. Ann. § 316.1933(1)(a); Ga. Code Ann. § 40-5-67.1(d), (d.1); Haw. Rev. Stat. §§ 291E-15, 291E-21(a); Iowa Code Ann. §§ 321J.9(1), 321J.10(1), 321J.10A(1); Kan. Stat. Ann. § 8-1001(b), (d); Ky. Rev. Stat. Ann. § 189A.105(2); Md. Code Ann., Transp. § 16-205.1(b)(1), (c)(1); Mass. Gen. Laws ch. 90 § 24(1)(e), (f); Mich. Comp. Laws Ann. § 257.625d(1); Mont. Code Ann. § 61-8-402(4), (5); N.M. Stat. Ann. § 66-8-111(A); N.Y. Veh. & Traf. Law §§ 1194(2)(a)(4)(b)(1), 1194(3); N.D. Cent. Code Ann. §§ 39-20-01.1, 39-20-04(1); N.H. Rev. Stat. Ann. §§ 265-A:14(I), 265-A:16; Okla. Stat. Ann. tit. 47, § 753; Or. Rev. Stat. Ann. § 813.100(2); R.I. Gen. Laws §§ 31-27.2.1(b), 31-27-2.9(a); S.C. Code Ann. §§ 56-5-2946, 56-5-2950(B) (as construed in *State v. Mullins*, 489 S.E.2d 923, 924 (1997)); 23 Vt. Stat. Ann. tit. 23 § 1202(b), (f); ; Wash. Rev. Code Ann. § 46.20.308(3), (5); W. Va. Code Ann. § 17C-5-7 (as construed in *State v. Stone*, 728 S.E.2d 155, 167-68 (W. Va. 2012)); Wyo.Stat.Ann. § 31-6-102(d).

[10] Fourth Amendment rules are not determined by state law, *Virginia v. Moore*, 553 U.S. 164 (2008), but *Garner* illustrates how the Court's assessment of reasonableness can be informed by relevant state practices.

all cases or in every case that does not involve a death or serious bodily injury. *See* n.9, *supra*.[11]

Explaining the relevance of this comparison, the *Garner* Court observed:

> We would hesitate to declare a police practice of long standing "unreasonable" if doing so would severely hamper effective law enforcement. But the indications are to the contrary. There has been no suggestion that crime has worsened in any way in jurisdictions that have adopted, by legislation or departmental policy, rules [limiting the use of lethal force].

471 U.S. at 19. The same observation applies to this case. Petitioner has cited no statistics, and Respondent is aware of none, suggesting that the drunk driving problem is greater or the DWI conviction rate is lower in states that have prohibited warrantless blood draws in whole or in part. And, because compulsory blood draws do not have the common law history of the fleeing felon rule that the Court rejected in *Garner*, the experience of other states should carry even more weight in evaluating Petitioner's claimed need for a *per se* exception to the warrant requirement.

The implicit assumption underlying Petitioner's argument is that the absence of chemical test results makes it more difficult to convict in DWI cases. Even if that were so, it would not lead to the

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[11] The compulsory testing for railroad employees that this Court upheld in *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), similarly applied only when there was a death, significant injury, or substantial property damage. *Id.* at 609.

per se exception to the warrant requirement that Petitioner seeks. As this Court has observed: "The investigation of crime would always be simplified if warrants were unnecessary. But the Fourth Amendment reflects the view of those who wrote the Bill of Rights that [individual] privacy ... may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law." *Mincey v. Arizona*, 437 U.S. at 392.[12]

In fact, the evidence is far more ambiguous. The National Highway and Traffic Safety Administration (NHTSA) recently published a study of the relationship between breath test refusals and DWI conviction rates in five counties across the nation that were "selected to provide a range of factors believed to affect prosecution." NHTSA, Breath Test Refusals & Their Effect on DWI Prosecution (July 2012) (*Breath Test Refusals*), at v, *available at* http://www.nhtsa.gov/staticfiles/nti/pdf/811551.pdf. The authors of the study concluded that "our results do not indicate a clear relationship between refusing a BAC test and the probability of conviction for DWI/DUI." *Id.* at 44. Conversely, "refusers in sites where data was available received more severe sanctions than non-refusers. Average jail sentences and average fines were consistently higher for refusers than for non-refusers in all four sites for which data was available." *Id.* at 46.

These results were consistent with the conclusion of another NHTSA report published in

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[12] Thus, the statement in *Schmerber* that blood test results are "a highly effective means of determining the degree to which a person is under the influence of alcohol," 384 U.S. at 771, does not resolve the question of when warrants are required.

2008, which likewise found that "BAC test refusal does not necessarily lead to lower conviction rates, even if the lack of BAC concentration information makes prosecution more difficult." NHTSA, Refusal of Intoxication Testing: A Report to Congress (Sept. 2008), at 10, *available at* http://www.nhtsa.gov/DOT/NHTSA/Traffic%20Injury%20Control/Articles/Associated%20Files/811098.pdf.

Summarizing this information in August 2012, the NHTSA wrote: "The relationship between refusals and conviction rates is complex." NHTSA, Traffic Tech: Breath Test Refusals and DWI Prosecution (August 2012), *available at* http://www.nhtsa.gov/staticfiles/traffic_tech/811653.pdf.

> If an officer has the probable cause to initiate an impaired driving stop and make the arrest, then the BAC serves then as additional, but not the only, evidence of impaired driving. Furthermore, many DWI cases never get to trial – the suspect pleads guilty (or not) based on his or her own belief about the strength of the case. As the data indicate that those who refuse often receive stronger sanctions, many drivers who have experience with the court system may choose to provide a BAC rather than face additional sanctions. It is also possible that a prosecutor may be even more motivated to present a strong case when there is a refusal, and devote increased attention to this kind of case.

Ibid.

In addition, Petitioner's claim of overriding need ignores the fact that approximately 80% of drivers nationwide consent to a breath test when stopped for drunk driving. *Breath Test Refusals*, at v.[13] Petitioner does not even attempt to explain why the State needs to put a needle in the arm of someone who has already submitted to a voluntary breath test. If that case can be made on a particular set of facts, it should be made to a neutral and detached magistrate. *See Winston v. Lee*, 470 U.S. at 765 (noting that the State had "substantial additional evidence" that mitigated the need for compelled surgery).[14]

Finally, while BAC evidence may be helpful to the government in prosecuting DWI cases,[15] it is only indispensable if the government chooses to prosecute under a statute where a BAC reading of .08 or above is an element of the crime. Every state and the District of Columbia now has such laws, in part because Congress has made the adoption of such laws a condition of federal highway funds. 23 U.S.C. § 163(a); U.S. Br. at 19. Every state, including

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[13] While the refusal rate varies among the states, there has been "relatively little change" in the nationwide rate since at least 1987. *Breath Test Refusals*, at v.

[14] The United States appears to recognize this flaw in the argument for a *per se* rule, but its only response is that it is irrelevant here since Respondent objected to both the breath test and the blood test. Brief of the United States as *Amicus Curiae* in Support of Petitioner (U.S. Br.) at 30 n.5. The government's reasoning is exactly backwards. It is the facts of Respondent's case that are irrelevant to the *per se* rule that the United States and Petitioner are advocating.

[15] Of course, it can also be helpful to the defendant if it reveals a BAC below the legal limit.

Missouri, also has what the National Highway and Traffic Safety Administration describes as "standard DWI laws," which make it a crime to drive while impaired or intoxicated. *See generally* NHTSA, Digest of Impaired Driving and Selected Beverage Control Laws (26th ed. October 2012) (collecting state laws as of June 1, 2011), *available at* http://www.nhtsa.gov/staticfiles/nti/pdf/811673.pdf.

BAC evidence is not an element of the crime in "standard" DWI prosecutions. In Missouri and elsewhere, "[t]he State is not required to produce results of a chemical test to prove intoxication. It has long been held that circumstantial evidence may prove the elements of the offense." *State v. Hall*, 201 S.W.3d 599, 603 (Mo. Ct. App. 2006)(internal quotations and citations omitted). The state can, and typically does, build its case around the arresting officer's observations, the results of one or more field sobriety tests, and a negative inference that can be drawn from the driver's refusal to submit to breath or blood testing. *See South Dakota v. Neville*, 459 U.S. 553 (1983). According to one of the two state troopers who testified at the suppression hearing in this case, the conviction rate for drivers who show four or more "clues" out of a total of six during the horizontal gaze nystagmus test is over 90%. J.A. 47.

B. Warrant Procedures, And The Time Necessary To Obtain A Warrant, Vary By Time And Place.

Petitioner's contention that the delay inherent in obtaining a search warrant creates an exigent circumstance that justifies a *per se* rule authorizing warrantless searches in *all* DWI cases is equally flawed. While there may be circumstances in which

a warrant cannot be obtained without undue delay – which is the essence of this Court's holding in *Schmerber* – that is not true in every case or in every jurisdiction.

At the time *Schmerber* was decided in 1966, search warrant applications had to be presented in person to the issuing magistrate. That is no longer the case. In 1977, the Federal Rules of Criminal Procedure were amended to allow for telephonic warrants. Fed. R. Crim. P. 41(d)(3). In 1993, the Rule was amended again to permit the use of fax machines. *Id.* The language of the Rule now provides that "a magistrate judge may issue a warrant based on information communicated by telephone or other reliable electronic means." *Id.* These changes were specifically designed to encourage the use of search warrants in situations where the police were otherwise engaging in warrantless searches. As the advisory committee explained, the "use of search warrants can best be encouraged by making it administratively feasible to obtain a warrant when one is needed." *Id.* advisory committee's note (1977 Amendments). *See generally* Note, *Press One for Warrant: Reinventing the Fourth Amendment's Search Warrant Requirement Through Electronic Procedures*, 55 Vand. L. Rev. 1591, 1605-07 (2002).[16]

Even prior to the federal amendments, states had been encouraged to "enact legislation that

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[16] Missouri has chosen not to take advantage of technological developments to expedite the warrant process. Under Missouri law, both the warrant application and the warrant must still be in writing. Mo. Rev. Stat. § 542.276. But that decision should not be the measure of Fourth Amendment reasonableness in states that have chosen otherwise.

provides for the issuance of search warrants pursuant to telephoned petitions and affidavits from police officers." National Advisory Comm'n on Criminal Justice Standards and Goals, Report on Police 95 (1973) (cited in Fed. R. Crim. P. 41(d)(3) advisory committee's note (1977 Amendments)). Approximately 20 states have done so in the intervening decades.[17]

More recently, an increasing number of states allow for the electronic transmission of warrants. In California, for example, an officer seeking a search warrant can be sworn over the telephone. Thereafter,

> [t]he affiant shall sign his or her affidavit in support of the application for the search warrant. The affiant's signature shall be in the form of a digital signature or electronic signature if electronic mail or computer server is used for transmission to the magistrate. The proposed search warrant and all supporting affidavits and attachments shall then be transmitted to the magistrate utilizing facsimile

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[17] Ala. R. Crim. P 3.8(b); Alaska Stat. Ann. § 12.35.015; Ariz. Rev. Stat. Ann. § 13-3914; Ark. Code Ann. § 16-82-201; Cal. Penal Code 1526; Colo. R. Crim. P. 41(c)(3); Idaho Code Ann. § 19-4406; Ind. Code Ann. § 35-33-5-8; La. Code Crim. Proc. Ann. art 162.1; Mont. Code Ann. § 46-5-222; Neb. Rev. Stat. § 29-814.03; N.H. Stat. § 595-A: 4-a; N.J. R. CRR 3:5-3(b); N.Y. Crim. Proc. § 690.36; N.D. R. Crim. P. 41; S.D. Codified Laws § 23A-35-4.2, 7; Utah. R. Crim. P. 40(l); Vt. R. Crim. P. 41(b)(c); Wash. Sup. Ct. Crim. R. 2.3(c); Wis. Stat. Ann. § 968.12(3). *See also* 2 Wayne R. LaFave, *Search and Seizure: A Treatise on Fourth Amendment Law* § 4.3(c), at 511-12 & n.29 (4th ed. 2011)(collecting sample of state laws).

> transmission equipment, electronic mail, or computer server.

Cal. Penal Code § 1526(b)(2)(A). If the application is granted, the magistrate may similarly "transmit via facsimile transmission equipment, electronic mail, or computer server, the signed search warrant to the affiant who shall telephonically acknowledge its receipt." *Id.* at § 1526(b)(2)(D).

In addition to California, at least six other states now authorize e-mail warrants and one state, Utah, permits text messaging.[18] In *State v. Rodriguez*, 156 P.3d 771 (Utah 2007), the Utah Supreme Court specifically relied on "[t]he astonishing advances that have marked communications and information technology over recent decades," *id.* at 778, to reject a *per se* rule permitting warrantless blood draws in all DWI cases. As the Court explained: "Utah Rule of Criminal Procedure 40 exploits communications and information technology in the cause of making warrants more readily obtainable without compromising the core constitutional considerations of authenticity and impartiality. In most cases, a police officer has readily at hand several methods of applying for a search warrant from the scene of an accident, a medical facility, or any other location where probable cause has been established." *Id.* at 779.

It is not necessary to speculate about the impact that electronic warrants can have on the time needed to secure a warrant. The following

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[18] Colo. R. Crim. P. 4(c)(3); Mich. Comp. Laws § 780.651; N.D. R.Crim. P. 41; Utah R. Crim. P. 41(1); and Vt. R. Crim. P. 41(b)(c).

description of nighttime applications appeared in a recent edition of the official publication of the Kansas County and District Attorneys Association:

> Until recently in Douglas County, it took two officers to obtain a search warrant. The arresting officer would complete the search warrant affidavit and drive to the judge's home while another officer would transport the suspect to the hospital. Each time an officer woke a judge, the judge had to wait for the officer to arrive and review the search warrant before being able to go back to bed ... The Douglas County judges searched for a better system that would facilitate the issuance of search warrants. After purchasing an iPad® for each judge, a judge can now review a search warrant e-mailed in pdf format using GoodReader® software installed on the iPad®, sign the search warrant directly on the iPad®, and e-mail the signed search warrant back to the officer. Since beginning to use the equipment in February, what used to take two officers and one and a half to two man hours to obtain a search warrant and retrieve a blood sample now takes one officer about 45 minutes. *From the time the officer begins completing the search warrant affidavit form to the time the judge returns the signed search warrant is now about 15 minutes.* The additional time is the time necessary to get the suspect to the medical facility/professional and obtain the blood sample ..."

Gregory T. Benefiel, *DUI Search Warrants: Prosecuting DUI Refusals*, 9 The Kansas Prosecutor, no. 1, Spring 2012, at 18-19, http://www.kcdaa.org/KSProsecutor/KSProsecutor-Spring12.pdf (emphasis added).

The story is similar in Utah. A 2008 article describing a pilot program to introduce electronic warrants reported that one officer "requested an e-warrant for a forced blood draw on a man arrested for DUI. The warrant was approved in about five minutes." *See* Jason Bergreen, *Utah Cops Praise Electronic Warrant System*, Salt Lake Trib. (Dec. 26, 2008), http://www.policeone.com/police-products/communications/articles/1769302-Utah-cops-praise-electronic-warrant-system/.

Even telephonic warrants can significantly decrease the amount of time necessary to secure a warrant. *See e.g.*, *State v. Flannigan*, 978 P.2d 127, 154 (Ariz. Ct. App. 1998)("The record establishes that the Mesa Police Department is able to obtain a [telephonic] warrant within as little as fifteen minutes and that delays of only fifteen to forty-five minutes are commonplace."); *People v. Blackwell*, 147 Cal.App.3d 646, 653 n.2 (Cal. Ct. App. 1983)(citing a 1973 study from a San Diego District Attorney's office estimating that 95% of telephonic warrants can be obtained in less than 45 minutes). *See also Steagald v. United States*, 451 U.S. at 222 (noting that telephonic search warrants may mitigate the need to conduct a warrantless search based on exigent circumstances).

Whatever justification there may be for a warrantless blood draw disappears in cases where the time it takes to obtain a search warrant is no

greater, or not significantly greater, than the time it takes to drive the suspect to a hospital. A *per se* rule authorizing a warrantless blood draw in such cases would no longer serve the purposes that underlie the exigent circumstances exception. *See Arizona v. Gant, supra.*[19]

It would, moreover, create a perverse disincentive encouraging police officers to disregard the warrant requirement even in the absence of a true emergency. Once officers are instructed that they can compel non-consensual blood draws in every DWI case without a warrant, regardless of whether a warrant could be procured in a timely manner, "what rational officer would not take those measures?" *Thornton v. United States*, 541 U.S. at 628 (Scalia, J., concurring). *See also* Fed. R. Crim. P. 41(d), advisory committee's note.

Finally, local magistrates, familiar with local procedures and conditions, are in the best position to judge whether a warrant could have been obtained without undue delay. *See Minnesota v. Olson*, 495 U.S. at 100. For that reason, as well, the determination of whether exigent circumstances justify a warrantless blood draw in any particular case is not amenable to a *per se* rule.

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[19] Under Missouri law, Respondent had an absolute right to consult with an attorney before deciding whether to consent to a blood test. *See* n.3, *supra*. Had he exercised that right, the police would have been required to wait another 20 minutes before proceeding with a warrantless blood draw. *Id.* Other states have similar provisions, implicitly recognizing that the interest in obtaining BAC results as quickly as possible must be balanced against other important constitutional considerations. The individual's interest in bodily integrity certainly qualifies as an important constitutional consideration.

C. Evidentiary Rules Governing Retrograde Extrapolation Also Vary From Jurisdiction to Jurisdiction.

Petitioner and its *amici* place great emphasis on the fact that the level of alcohol in the blood naturally diminishes over time. While that is undeniably true, it also distinguishes this case from other cases where the Court has recognized exigent circumstances based on the potential destruction of evidence. This Court's description of the general rule in *Roaden v. Kentucky* is both illustrative and revealing: "Where there are exigent circumstances in which police action literally must be 'now or never' to preserve the evidence of the crime, it is reasonable to permit action without prior judicial evaluation." 413 U.S. at 505. *Kentucky v. King*, 131 S. Ct. 1849 (2011), reflected a similar understanding. The Court observed in that case that "[d]estruction of evidence issues probably occur most frequently in drug cases because drugs may be easily destroyed by flushing them down a toilet or rinsing them down a drain." *Id.* at 1857.

There is no evidence that is flushed down the toilet or rinsed down the drain in a DWI case. Instead, there is a slow, steady, and relatively predictable process by which the body eliminates alcohol from the bloodstream. This process takes place in two stages. As long as one continues to drink, the body continues to absorb alcohol. The absorption process usually lasts for approximately 30 minutes after the drinking has stopped, when the blood alcohol content reaches its peak. U.S. Br. at 24. n.2 (citing studies). At that point, the body begins to eliminate alcohol through the liver, and the BAC declines.

While the rate of absorption and elimination can vary based on individual characteristics, it is generally agreed that alcohol dissipates at a rate between .015 and .02 per hour, J.A. 47, and that the rate of dissipation is linear until there is very little alcohol left in the body. *See* A.W. Jones, *Biochemical and Physiological Research on the Disposition and Fate of Ethanol in the Body*, *in* Garriott, *supra* n.1, at 88. Thus, for example, assuming a faster dissipation rate of .02 per hour, an individual who is tested three hours after reaching a peak of .08 – the legal limit in most states - will have a BAC of .02. The process of retrograde extrapolation involves working backward from the test results to calculate an individual's BAC at the time of arrest. To the extent that retrograde extrapolation is deemed reliable by the courts, it creates a window of opportunity for the police that can last three hours or longer (depending on peak BAC) rather than a "now-or-never" situation.

Like most scientific evidence, retrograde extrapolation can be challenged. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 319 (2009)("Serious deficiencies have been found in the forensic evidence used in criminal trials."). Petitioner's *amici* in particular stress that defense lawyers can and do raise such challenges on a regular basis. U.S. Br. at 23; NDAA Br. at 10. This case is not the occasion for the Court to resolve that dispute, however, which is primarily addressed in any event through state evidentiary rules. For present purposes, it is far more relevant that the states have reached different judgments on that evidentiary question.

Challenges to retrograde extrapolation as inherently unreliable and thus excludable in all cases have not fared well. *E.g.*, *State v. Jensen*, 482

N.W.2d 238 (Minn. Ct. App. 1992) (*Frye* test does not apply because retrograde extrapolation is not "emerging or novel"); *State v. Vliet*, 95 Haw. 94 (Haw. 2001). Case-based challenges have produced a range of results. Some courts have excluded expert testimony on retrograde extrapolation because the proffered evidence did not take into account potentially relevant variables. *E.g.*, *Mata v. State*, 46 S.W.23d 902 (Tex. Crim. App. 2001); *State v. Eighth Judicial District Court*, 267 P.3d 777 (Nev. 2011). Other states have ruled that challenges to the reliability of expert testimony on retrograde extrapolation go to weight, not admissibility. *E.g.*, *State v. Taylor*, 600 S.E.2d 483 (N.C. Ct. App. 2004); *State v. LaVoie*, 152 N.H. 542 (N.H. 2005). Some states have adopted so-called time-of-test rules, under which a BAC result over the legal threshold that is obtained within a specified period of time after arrest – usually two or three hours – is either treated as *prima facie* evidence of intoxication, *e.g.*, Ariz. Rev. Stat. Ann. § 28-1381(A)(2), or as establishing a rebuttable presumption, *e.g.*, Ind. Code Ann. § 9-30-6-15. Other states do not appear to have addressed the question of retrograde extrapolation, either by statute or case law. *See generally Admissibility and Sufficiency of Extrapolation Evidence in DUI Prosecutions*, 119 A.L.R.5th 379 (2004)(updated version available online).

Like the variation in warrant procedures, variations regarding the admissibility of extrapolation evidence caution against a *per se* rule authorizing warrantless searches based on an assumption of exigency that does not universally apply.

D. Compelled Blood Draws Implicate Significant Privacy Interests.

Quoting *Schmerber*, Petitioner describes compelled blood draws as a "minor intrusion" on personal privacy. Pet. Br. at 33-35. But the fact that blood tests may be "commonplace," *Schmerber*, 384 U.S. at 771, and "that for most people the procedure involves virtually no risk, trauma, or pain," *id.*, does not extinguish the privacy interest entirely nor relieve the State of its burden of demonstrating that a *per se* rule is necessary in every DWI case.[20]

In *Schmerber*, the Court concluded that the defendant's privacy interest was outweighed by the State's need to obtain a blood sample without further delay in light of the "special facts" present in that case, and thus approved a warrantless search. *See* pp. 27-28, *supra*. This Court has never suggested, however, that a warrantless blood test can be deemed reasonable even in the absence of exigent circumstances because the intrusion on personal privacy is entitled to little or no weight.

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[20] Petitioner invests the word "commonplace" with more weight than it can carry. That a procedure may be described as commonplace in an individual's private life says little about the degree to which the procedure undermines personal dignity when forcibly conducted at the State's behest. As the Court explained in *Winston*, there is a vast difference between a medical procedure "conducted with the consent of the patient," where the medical professional "is carrying out the patient's own will concerning the patient's body[,]" and a procedure that "involves a virtually total divestment of respondent's ordinary control" to the State over intrusions "probing beneath his skin." 470 U.S. at 765.

To the contrary, the Court has acknowledged that having to submit to a compelled blood test "perhaps implicated Schmerber's most personal and deep-rooted expectations of privacy." *Winston v. Lee*, 470 U.S. at 760. The Court has long recognized that intrusions on bodily integrity go to the very heart of the Fourth Amendment. *Schmerber* itself noted that "interests in human dignity and privacy," 384 U.S. at 769-70, are triggered whenever the State engages in "searches involving intrusions beyond the body's surface." *Id.* at 369. *Schmerber* characterized such interests as "fundamental," *id.* at 770, and stressed that "[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." *Id.* at 767.

That view has both ancient roots and modern resonance. *See* 1 William Blackstone, Commentaries, *127, *129 (stating that an "absolute right[]" of an individual was "the right of personal security [which] consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, [and] his health . . . . "). *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. at 602 (citation omitted)("In light of our society's concern for the security of one's person, it is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable."); *State v. Rodriguez*, 156 P.3d 771, 775 (Utah 2007) (rejecting a rule of per se exigency for invasive alcohol-related blood seizures, and explaining that "the interest that poses the most substantial countervailing force to a community's interest in effective law enforcement is the dignity and integrity of the human body."). *See also Cruzan v. Director,*

Missouri Dept. of Health, 497 U.S. 261, 287-288 (1990)(O'Connor, J., concurring)("[T]he Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause . . . Fourth Amendment jurisprudence has echoed this same concern.").

The stomach pump in *Rochin v. California*, 342 U.S. 165, and the chest surgery in *Winston v. Lee*, 470 U.S. 753, were undoubtedly severe intrusions on bodily integrity and assaults on human dignity. This Court has never held, however, that they represent the outer limits of constitutional privacy. What the Court has done is to recognize a spectrum of privacy interests infringed by a range of police tactics, including procedures significantly less invasive than forced blood draws.

For example, the Court has described the patting of a suspect's outer clothing and the taking of a suspect's fingernail scrapings as a "'severe, though brief, intrusion upon cherished personal security,'" *Cupp v. Murphy*, 412 U.S. 291, 295 (1973)(quoting *Terry v. Ohio*, 392 U.S. 1, 24-25 (1968). *See also New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (noting that the search of a student's purse, even in a school, is "undoubtedly a severe violation of subjective expectations of privacy").

If a "careful exploration of the outer surfaces of a person's clothing" in search of weapons and the scraping of a person's fingernails for evidence are "a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment," *Terry*, 392 U.S. at 16-17, surely plunging a needle into a person's arm is an even greater intrusion and indignity. Paraphrasing *Terry*,

to categorize such an invasion as a mere "'petty indignity'" would be "simply fantastic." *Id.* Yet that is exactly what Petitioner does.

The manner in which a blood draw is conducted may make it more or less reasonable, *Schmerber*, 384 at 771-72, but the privacy interest remains the same. Home searches provide a useful analogy. The safeguards of the Fourth Amendment apply regardless of whether the police are using thermal imaging to pry into the privacy of a home or barging into the living room.

> In *Silverman*, for example, we made clear that any physical invasion of the structure of the home, "by even a fraction of an inch," was too much, and there is certainly no exception to the warrant requirement for the officer who barely cracks open the front door and sees nothing but the nonintimate rug on the vestibule floor. In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes.

Kyllo v. U.S, 533 U.S. 27, 37 (2001)(citation omitted)(emphasis in original).

Petitioner's contention that Respondent had a diminished expectation of privacy in this case because he was driving a car when stopped by the police is equally flawed. "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." *Coolidge v. New Hampshire*, 403 U.S. at 461. Respondent is a person, not a car. For reasons previously described, *see* pp. 24-25, *supra*, the automobile exception to the warrant requirement does not extend to compelled

blood draws of a vehicle's occupants.

Petitioner's reliance on *New York v. Class*, 475 U.S. 106 (1986), for the proposition that motorists have a diminished expectation of privacy due to the pervasive regulation of the automobile industry is misplaced. In *Class*, the Court upheld a search of the interior of an automobile to remove papers from the dashboard obscuring the vehicle identification number, which then revealed a weapon in plain view under the driver's seat. Invasive bodily searches were not at issue; rather, the Court focused on the lessened expectation of privacy in the automobile itself.

Not surprisingly, this Court has often highlighted the distinction between people and cars that Petitioner's argument obscures. *See, e.g.*, *Delaware v. Prouse*, 440 U.S. 648, 663 (1979) ("[P]eople are not shorn of all Fourth Amendment protection when they step from their homes onto the public sidewalks. Nor are they shorn of those interests when they step from the sidewalks into their automobiles."); *U.S. v. Di Re*, 332 U.S. 581, 587 (1948) ("We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled"); *City of Indianapolis v. Edmond*, 531 U.S. 32, 55 (2000) (Rehnquist, C.J., dissenting)("[T]he brief seizure of an automobile can hardly be compared to the intrusive search of the body or the home."); *Almeida-Sanchez v. United States*, 413 U.S. 266, 279 (1973) (Powell, J., concurring)("The search of an automobile is far less intrusive on the rights protected by the Fourth Amendment than the search of one's person or a building.").

Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, which Petitioner also cites, is distinguishable on other grounds. Respondent was not an employee in a pervasively regulated industry when he was arrested, as were the Federal Railroad Administration employees in *Skinner*, *id.* at 627, and the toxicological tests in *Skinner*, unlike the blood test at issue here, were not designed "to assist in the prosecution" of those tested. *Id.* at 620. If anything, this case is less like *Skinner* and more like *Ferguson v. City of Charleston*, 532 U.S. 67, where law enforcement was intimately involved in the design and implementation of a program to drug test maternity patients suspected of cocaine use. The warrantless searches in *Ferguson* were declared unconstitutional. *See also* p.23 & n.11, *supra*.

Petitioner's argument that Respondent somehow waived his privacy rights by virtue of Missouri's implied consent law fares no better. Under Missouri's implied consent law, Respondent consented to the revocation of his driver's license if he was arrested for a DWI offense and refused to consent to a breath or blood test. *See* n.3, *supra*. He did not irrevocably consent to the blood test. Indeed, Missouri's implied consent law expressly recognizes the right of drivers, like Respondent, to withdraw their consent if stopped for drunk driving. *Id.* It makes no sense to say that Respondent has a diminished or non-existent claim to privacy when he retains the right to reclaim his privacy at precisely the point that it becomes imperiled – that is, when the state seeks to override his objection to a warrantless blood draw.

Finally, while Respondent's blood was drawn by trained medical personnel in a hospital setting,

that will not always be the case if this Court adopts the *per se* rule that Petitioner is advocating. In Arizona, for example, blood can be drawn at the arrest scene by police officers who have ostensibly been trained to draw blood.[21]

In the end, the *Schmerber* Court may have best summarized the privacy interests at stake. "The integrity of an individual's person is a cherished

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[21] An Arizona appellate court described one such blood draw in *State v. Jimenez*, CR20051907 (Ariz. Sup. Ct. 2005), slip op. at 2-3:

> The deputy directed the defendant to lean over the trunk of his patrol car with his knees slightly bent to have his blood drawn. When the deputy inserted the needle into the defendant's arm, he leaned back or straightened up causing his arm to move. On the second attempt to draw blood, the defendant flinched, jerking his arm. Thus, instead of obtaining the standard two vials of blood for testing, only one partial vial was obtained.
>
> The trial court further found that the procedures used by the deputy in this case violated the accepted protocol for drawing of blood. There is no dispute that the protocol for extraction of blood requires that the subjects be seated and have their arm supported. As supported by the record, the trial court cited numerous risks to persons who are standing when their blood is drawn, including risk of pain and serious injury if they were to become dizzy, faint or experience a sudden drop in blood pressure. Other medical problems could occur in connection with a blood draw. The trial court further noted that with the vacutainer method (as used in this case), the needle may draw in air. If the subject is standing, the subject may be injured by hitting his head on the ground if he fell because he fainted or was dizzy or the needle could be torn out of a vein or could hit a nerve.

value in our society." 384 U.S. at 772.

III. THE FACTS OF THIS CASE DO NOT ESTABLISH EXIGENCY UNDER A TOTALITY-OF-THE-CIRCUMSTANCES TEST.

Both the trial court and a unanimous Missouri Supreme Court concluded in this case that the State had not carried its burden of proving exigent circumstances, and therefore suppressed the results of Respondent's blood test that was taken without consent and without a warrant. That finding is amply supported by the record below. It is also entitled to deference. *See United States v. Doe*, 465 U.S. 605, 614 (1984) ("We have been reluctant to disturb findings of fact in which two courts below have concurred."); *Minnesota v. Olson*, 495 U.S. at 100 ("We are not inclined to disturb this fact-specific application" of the exigent circumstances exception.).

By all accounts, this was a "run-of-the-mill" DWI case. Pet. App. 3a, 43a. There was no delay in the arrest, there was no accident to investigate, and there were no injuries at the scene. Pet. App. 20a. Corporal Winder, the arresting officer, testified at the suppression hearing and was presumably prepared to testify at trial that Respondent smelled of alcohol, his eyes were bloodshot, and his speech was slurred when he was stopped on the highway a little after 2:00 a.m. for traveling 10 miles above the posted speed limit. J.A. 31. Winder administered four field sobriety tests and testified that Respondent performed poorly on all of them. J.A. 31-32.

At the time of Respondent's arrest, Cape Girardeau County had simplified the search warrant process in DWI cases. The County Prosecutor's Office

had prepared standardized forms for use by the arresting office, the prosecuting attorney, and the issuing judge. J.A. 61-69. Those forms were "readily available," J.A. 42, and could have been completed in a matter of minutes had Corporal Winder chosen to seek a search warrant. Since Respondent was subjected to a compulsory blood test only 25 minutes after he was initially stopped, Pet. App. 40a, it is reasonable to infer that he arrived at the hospital no more than 20 minutes after the highway stop. A prosecutor and a judge were on call throughout the night. J.A. 41-42; Pet. App. 40a-41a. If requested, the prosecutor could have met Winder at the hospital to complete the necessary forms. J.A. 53.

During the suppression hearing, Winder acknowledged that he had never experienced any difficulty in obtaining a search warrant in prior DWI cases, and had no reason to believe that he would have experienced any difficulty had he sought a search warrant in Respondent's case. J.A. 42. In addition, Winder testified that his decision not to contact a prosecutor or seek a search warrant was not based on exigent circumstances as he understood them having served as a trooper with the Missouri State Highway Patrol for more than seventeen years, J.A. 29, 41. Rather, it was based exclusively on his understanding that the law in Missouri had changed and that search warrants were no longer required. J.A. 39-40.[22]

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[22] Winder's factual belief that he could have obtained a timely warrant in this case based on his own prior experience in similar cases is relevant to the objective reasonableness of the search and not because of what it reveals about Winder's subjective motivation. Petitioner's reliance on *Whren v. United States*, 517 U.S. 806, 812 (1996), is thus misplaced.

To bolster a claim of exigency that Winder's testimony did not support, Petitioner cites the testimony of a second police officer, Sergeant Blaine Adams, who indicated at the suppression hearing that the process of obtaining a search warrant took "about two hours." J.A. 54; Pet. Br. at 53. However, an exhibit entitled "Recent Cape County Search Warrants For Blood," J.A. 70, which was admitted without objection at the suppression hearing, J.A. 54, shows that the time period from application to warrant was 30 minutes or less in five of the six identified cases, including applications submitted in the middle of the night.[23] Materials prepared by the Cape Girardeau Prosecutor for a meeting of the Missouri Association of Prosecuting Attorneys 18 months prior to Respondent's arrest similarly noted that "the Cape Girardeau County Prosecutor's Office has standard forms to use in [DWI cases] with blanks to fill in so the warrant may be obtained *in minutes* since time is always of the essence in these cases." H. Morley Swingle, Search & Seizure Law in Missouri 19 (2009)(emphasis added), *available at* http://www.capecounty.us/files/ProsecutingAttorney/SEARCH&SEIZURE_BOOK.pdf.

Moreover, Adam's testimony appears to have been discounted by the trial judge, who was presumably familiar with local practices and conditions. After reviewing the submissions by both

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[23] The exhibit documents the time that the warrant was issued in each of the cases. It then sets forth either the time of the warrant application or the time of the officer's last observation of the suspect before submitting the warrant application. The difference appears to be immaterial, however, since the time of last observation and the time of the warrant application are identical in the two cases where both are listed.

parties, he wrote: "None of the authorities submitted on this issue have held, on their own facts, that an officer may obtain a warrantless blood draw on an ordinary driving while intoxicated arrest *when a warrant could be procured in a timely manner.*" Pet. App. 45a (emphasis added). The highlighted comment would make little sense in an opinion granting Respondent's motion to suppress unless the trial court believed that a warrant could have been "procured in a timely manner" in this case, or at a minimum, that Petitioner had failed to prove otherwise. The Missouri Supreme Court took a similar view, stating "there is no evidence here that [Winder] would have been unable to obtain a warrant had he attempted to do so." Pet. App. 3a.

These findings do not describe exigent circumstances, as that term has been defined by this Court's cases, including *Schmerber*. On this record, therefore, the decision to subject Respondent to a warrantless blood draw cannot be justified, and the motion to suppress the blood test results was properly granted.

CONCLUSION

The judgment of the Missouri Supreme Court should be affirmed.

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Dated: December 10, 2012

REPLY BRIEF

No. 11-1425

In The
Supreme Court of the United States

STATE OF MISSOURI,

Petitioner,

v.

TYLER G. McNEELY,

Respondent.

On Writ Of Certiorari To The Missouri Supreme Court

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I. THE SEARCH WAS REASONABLE UNDER THE TOTALITY OF THE CIRCUMSTANCES

Respondent's central contention is that the reasonableness of a search must be determined based on the totality of the circumstances. Respondent correctly observes that "[w]hen reviewing the constitutionality of warrantless searches, the Court has engaged in a balancing process, weighing the individual's privacy interests against the degree to which a warrantless search is necessary to advance legitimate governmental interests." Resp. Br. 18 (citing *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)). Indeed, the relevant Fourth Amendment inquiry is whether taking the blood sample was reasonable, and whether it was reasonable depends on balancing these interests after examining the totality of the circumstances. Applying this test to the case at hand, the search was reasonable.

Allowing a police officer to obtain a warrantless blood test from a drunk driver based upon probable cause strikes a favorable balance when "assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *United States v. Knights*, 534 U.S. 112, 118-119 (2001) (quoting *Houghton*, 526 U.S., at 300). The legitimate governmental interests, *i.e.*, the law enforcement interests in protecting innocent motorists from the dangers of drunk driving, are exceptionally strong. A prompt blood test measurement, taken with as little delay as possible, provides

the most reliable evidence of intoxication. The privacy interests, on the other hand, are minimal. This Court has long held that a simple blood test, taken by a trained technician in a hospital setting, is a minor intrusion. Because driving an automobile on a public street is a highly regulated governmental activity, motorists have a diminished expectation of privacy. The vital interest in public safety clearly outweighs the individual interests of a drunk driver in being subjected to a simple blood test. Under the totality of all of the circumstances, a compelled blood test, taken at the direction of a law enforcement officer and supported by probable cause, is a reasonable warrantless search under the Fourth Amendment.

Respondent contends that this test "leaves no room to consider the actual facts of a particular case." Resp. Br. 20. This is simply not true. Examining the totality of the circumstances of the case under review, the search at issue here was reasonable in all respects. The arresting officer clearly had probable cause to believe Respondent was driving drunk. J.A. 19-21, 29-37. It is an undeniable fact that alcohol is eliminated from the bloodstream, generally at a rate of approximately .015 to .020 per hour. J.A. 47-48. Nobody would dispute that a timely blood test measurement, taken as close to the time of driving as possible, provides the best and most reliable evidence of intoxication. If the arresting officer had sought a search warrant, a delay of approximately two hours would reasonably have been expected. J.A. 54. Furthermore, the search itself was conducted in a

reasonable manner, taken in a hospital environment by a trained medical technician. J.A. 20. Under the circumstances of this case, it was objectively reasonable to conclude that Respondent's blood alcohol level would have continued to dissipate, thus destroying evidence, during the inevitable delay necessary to obtain a search warrant. The search was reasonable, therefore, in order to prevent the imminent destruction of evidence.

A. The "Totality Of The Circumstances" Test Proposed By Respondent Is Impractical And Unworkable

1. Respondent's approach would lead to inconsistent application of Fourth Amendment guarantees

Dissatisfied with the end result, Respondent proposes a different version of the totality of the circumstances test, one which focuses almost exclusively on unpredictable factors regarding the time necessary to obtain a search warrant. Resp. Br. 11, 22-23. However, this Court has never required law enforcement officers to sit idly by and attempt to apply for a search warrant while evidence is in the actual process of destruction. Moreover, Respondent's proposed test is impractical, unworkable, and would ultimately result in inconsistent and chaotic application of Fourth Amendment protections.

For example, some of the important factors to consider under Respondent's proposed test include

"whether and how the interval between time of arrest and time of testing affects the admissibility of BAC evidence under state evidentiary rules" and "what the warrant procedures are in the particular state." Resp. Br. 22-23. Notably, Respondent points out that "Missouri has chosen not to take advantage of technological developments to expedite the warrant process." Resp. Br. 38 n.16.[1] Thus, under Respondent's proposed test, this would be an important factor actually weighing in *favor* of the warrantless blood draw at issue in this case. Regardless, Respondent's proposed test is fundamentally flawed because it would create an atmosphere in which Fourth Amendment protections would vary from state to state, based upon individual state laws and evidentiary rules. To be sure, this Court has held that the meaning of the Fourth Amendment does not change with state law or local practices. See, *e.g.*, *Virginia v. Moore*, 553 U.S. 164, 172 (2008) (noting that "[w]hile those practices 'vary from place to place and from time to time,' Fourth Amendment protections are not 'so variable' and cannot 'be made to turn upon such trivialities.'") (quoting *Whren v. United States*, 517 U.S. 806, 815 (1996)). Moreover, such an approach would enable individual states to alter Fourth Amendment guarantees through legislation, making them susceptible to

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[1] Search warrants in Missouri are governed by Mo. Rev. Stat. Sec. 542.276 (2010), which requires the application, the warrant, and any accompanying affidavit to be in writing. Telephonic search warrants are not available, as Sec. 542.276.3 specifically prohibits oral testimony from being considered.

change with each and every legislative session. Such an approach is not only misguided, but also inconsistent with basic constitutional principles.

Certainly, Fourth Amendment guarantees are not so malleable that they can change simply by crossing a state line. The inconsistency and uncertainty of Respondent's proposed test does not end there, however. Respondent asserts that another important factor to consider is "how long it typically takes to obtain a warrant in the jurisdiction." Resp. Br. 22. In the middle of the night in Cape Girardeau County, this delay is approximately two hours. J.A. 54. As Respondent concedes, local law enforcement practices and search warrant procedures will vary from jurisdiction to jurisdiction. Resp. Br. 37-43. Missouri, for instance, is comprised of 114 counties, the majority of which are in rural areas with a single prosecutor. Obviously, the length of delay from county to county may vary widely. Thus, Fourth Amendment guarantees would once again be subject to variation under Respondent's approach, this time from county to county within a state, based on the average amount of time it takes to apply for and obtain a search warrant in a particular jurisdiction.[2]

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[2] Perhaps more problematic, relying on a factor such as this has the potential of creating a perverse disincentive for police and prosecutors to promote the implementation of efficient warrant procedures. A warrant would more likely be required in a county that has made diligent efforts to implement efficient procedures to obtain warrants as expediently as possible,

(Continued on following page)

Other important factors to consider under Respondent's proposed test include "how far the police had to travel to a hospital" and "whether there was more than one officer at the scene." Resp. Br. 22. Fourth Amendment guarantees would potentially shift again, based upon such factors as the geographic location of the traffic stop and its proximity to the nearest hospital, and the number of officers who happen to be working during a given shift. The glaring practical problems with such an approach would leave police officers and reviewing courts in an impossible situation. For example, if an officer arrests a drunk driver thirty miles away from a hospital, but there is a back-up officer on the scene, is it *more* or *less* likely that a warrant would be required in that situation as opposed to a situation where an arrest is made by a single officer, working alone, but only ten miles away from the nearest hospital? The end result under Respondent's proposed test would leave police officers, not to mention the lower courts, with no clear practical guidance. Failure to consider such factors does not, by any means, mean that the totality of the circumstances inquiry is being rejected or abandoned.

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whereas a warrant would less likely be required in a jurisdiction that remained indifferent. Complacency, in a sense, would be rewarded.

2. Technological advancements have not removed the exigency in quickly securing blood alcohol evidence

Respondent further contends that advances in technology have diminished the exigency in quickly securing blood alcohol evidence. Respondent asserts that technological advancements, such as the possibility of obtaining warrants electronically, have removed the justification for a warrantless blood draw in a drunk driving case. Resp. Br. 37-43. While it is true that technological advancements may reduce the time necessary to transmit a warrant application to a judge, this comprises only a part of the process of obtaining a search warrant. As *amici* National District Attorneys Association point out, there will still be an inevitable delay involved in obtaining a search warrant in the middle of the night. *Amici* NDAA Br. 27-28. The police officer must still consult with a prosecutor, prepare the affidavit setting forth the facts establishing probable cause, contact a judge, and wait for the judge's response. And then, after it is approved, the officer still has the task of transporting the drunk driver to a medical facility and arranging for a technician to perform the blood draw. Communications technology can only affect one single part of the warrant process – transporting the warrant and supporting affidavit to the judge. This does not remove the exigency.

The experience of lower courts examining the process of obtaining telephonic search warrants is instructive. Respondent correctly notes that the

Federal Rules of Criminal Procedure were amended in 1977 to allow for telephonic search warrants. Fed. R. Crim. P. 41(d)(3). Resp. Br. 38. At the time, there was undoubtedly tremendous optimism that the days of unreasonable delays in obtaining search warrants were over. Certainly, at first glance it sounds like simply calling a judge to get a warrant approved would be simple, convenient, and instantaneous. When lower courts began examining the actual process of obtaining telephonic search warrants, however, they came to the realization that, in practical application, it was still a time consuming process. In *United v. Reid*, 929 F.2d 990 (4th. Cir. 1991), for example, the Fourth Circuit considered whether such a procedure diminished the exigency in drunk driving cases. The Court acknowledged that, "[a]t first blush, this argument sounds convincing." *Id.*, at 993. After examining the rules and procedures involved in obtaining such a warrant, however, the Court recognized that the exigency, in fact, was not diminished. The Court concluded that "[o]bviously, compliance with these rules takes time" and that "[t]ime is what is lacking in these circumstances." *Id.* Other courts have reached similar conclusions. See, *e.g.*, *State v. Shriner*, 751 N.W.2d 538, 549 (Minn. 2008), cert. denied, 555 U.S. 1137 (2009); *State v. Johnson*, 744 N.W.2d 340, 345 (Iowa 2008); *Dale v. State*, 209 P.3d 1038, 1044 (Alaska Ct. App. 2009).

The possibility of applying for a search warrant electronically likewise will not extinguish the exigency in quickly securing blood alcohol evidence during a

drunk driving investigation. Additionally, as Respondent concedes, even when the process is available, there will still be wide variations among jurisdictions in the amount of time necessary to obtain such a warrant. Resp. Br. 37-43. More importantly, this Court has never demanded an inquiry into how long it might take to obtain a warrant in each jurisdiction in cases involving the potential destruction of evidence. Indeed, requiring such an inquiry would be misguided, as it would lead to endless litigation and second-guessing.

Although Respondent highlights a few instances where electronic warrants seem to have been obtained expeditiously (Resp. Br. 42), the officer in the field will not be in a position to know if a search warrant will be obtained without any unanticipated delays. The Oregon Supreme Court recently observed that, although there may very well be rare instances where a search warrant could be both obtained and executed in a timely fashion, "[t]he mere possibility . . . that such situations may occur from time to time does not justify ignoring the inescapable fact that . . . evidence is disappearing and minutes count." *State v. Machuca*, 227 P.3d 729, 736 (Or. 2010). As the Oregon Supreme Court properly concluded, the focus of the courts should be on the exigency created by blood alcohol dissipation, not on the speed with which a warrant could presumably be obtained. *Id.*

The case under review only serves to highlight the inevitable delay necessary to obtain a warrant in the middle of the night. As Respondent correctly

points out, the Cape Girardeau Prosecuting Attorney's Office has made efforts to obtain warrants as quickly as possible by drafting forms that can be filled out and faxed to a judge. See J.A. 61-69. Respondent is also correct that, if requested, a prosecutor could have met the arresting officer to fill out the requisite forms so they could be submitted to a judge. Resp. Br. 55. Respondent is incorrect, however, when he asserts that the entire process "could have been completed in a matter of minutes had [the arresting officer] chosen to seek a search warrant." Resp. Br. 55. This characterization drastically minimizes the delay necessary to obtain a warrant under these circumstances. The reality is that the entire process would have involved a delay of approximately two hours. J.A. 54.

Respondent relies on Defendant's Exhibit C (reprinted at J.A. 70) to support the contention that search warrants could be obtained expeditiously. Defendant's Exhibit C outlined six cases where search warrants were obtained for blood samples in drunk driving investigations in Cape Girardeau County. The exhibit documents the time of the traffic stop, as well as the time the search warrant was issued. The exhibit does not, however, document the time the blood was actually drawn. See J.A. 52. The time the search warrant was issued only reflects the moment when the judge's signature is placed on the search warrant. Obviously, there are a number of additional time consuming steps that must be taken after the warrant is signed. The judge still needs to

get the warrant back to the prosecutor, the arresting officer still needs to transport the drunk driver to the hospital, and arrangements must still be made for a medical technician to draw the blood. The length of time it will take to accomplish these additional steps is difficult to predict. What we do know for certain is that there will be an additional delay.

Defendant's Exhibit C ultimately reveals there is, indeed, a significant delay involved in obtaining a search warrant in the middle of the night. Among the four cases occurring during nighttime hours, the time elapsed from the traffic stop to the time the search warrant was signed by the judge range from between one hour and forty minutes to one hour and fifty-seven minutes. J.A. 70. Once again, this does not reflect the time the blood was actually drawn. During this delay, reliable evidence of the drunk driver's intoxication is dissipating with every minute that passes.

3. Retrograde extrapolation does not diminish the exigency

Respondent contends that retrograde extrapolation, a process in which a scientist would work backwards from a blood test result in an attempt to calculate an individual's BAC at the time of arrest, diminishes the exigency in quickly securing blood alcohol evidence. Resp. Br. 44-46. Respondent concedes, however, that evidentiary rules governing

retrograde extrapolation vary from jurisdiction to jurisdiction.

More importantly, however, there are serious flaws with this technique. Most notably, the results of such an extrapolation are affected by numerous variables, many of which will only be known to the defendant. See, *e.g.*, *State v. Eighth Judicial District Court of the State of Nevada*, 267 P.3d 777, 783 (Nev. 2011) (outlining factors relevant to achieving a sufficiently reliable calculation, including: gender, weight, age, height, mental state, type and amount of food in stomach, type and amount of alcohol consumed, time the last drink was consumed, drinking pattern, elapsed time between first and last drink, time elapsed between last drink and blood draw, and the number of blood samples taken). There, the Court ultimately reversed the defendant's conviction for DUI because the expert did not have knowledge of many of defendant's personal characteristics and behaviors. *Id.*, at 783-784. Indeed, in most cases the variables necessary for a reliable extrapolation will simply not be known to the expert. See, *e.g.*, *Mata v. State*, 46 S.W.3d 902 (Tex. Crim. App. 2001) (holding it was an abuse of discretion to allow expert to extrapolate defendant's blood alcohol content from a single blood test taken over two hours after the alleged offense because, among other things, the expert had no knowledge of any personal characteristics of defendant); *State v. Downey*, 195 P.3d 1244, 1251-1252 (N.M. 2008) (reversing conviction for vehicular homicide, holding it was an abuse of

discretion to allow expert to perform retrograde extrapolation calculations because the expert did not know when the defendant had consumed his last drink); *Commonwealth v. Wirth*, 936 S.W.2d 78, 84 (Ky. 1997) (noting that without the defendant's cooperation, no valid extrapolation can occur because a number of facts known only to defendant are essential to the process). See also Dominick A. Labianca, *Retrograde Extrapolation: A Scientifically Flawed Procedure (DWI)*, The Champion (NACDL Jan.-Feb. 2012) (discussing flaws with retrograde extrapolation).

During the course of a drunk driving investigation, the arresting officer simply cannot be expected to know if the prosecutor will be able to find a scientific expert who is qualified to render an opinion based on retrograde extrapolation, nor will the officer know whether the expert will actually be able to make such an extrapolation based on facts and information available in the case. Furthermore, the arresting officer in the field certainly will not be able to predict if the trial judge will allow such evidence to be presented in court, and, of course, whether a jury finds such evidence to be persuasive is another matter entirely. What the arresting officer does know for certain is that a prompt chemical test, taken as close to the time of driving as possible, will provide the most accurate evidence of a drunk driver's actual level of impairment. Requiring a police officer in the field to consider such factors as exactly how much time it will take to obtain a warrant, how much evidence will be lost during the delay, whether the

state will still be able to secure a conviction, or whether an expert witness might be available at a trial, is simply unworkable.

B. Blood Alcohol Evidence Is Important In Drunk Driving Prosecutions

Blood alcohol evidence has played a critical role in the enforcement of our drunk driving laws throughout the Nation. For instance, in 1998 President Clinton signed an Executive Memorandum for the Secretary of Transportation, calling for a plan to promote the adoption of 0.08 Blood Alcohol Content (BAC) as the nationwide legal limit for impaired driving. *Memorandum on Standards To Prevent Drinking and Driving,* March 3, 1998 [Public Papers of the Presidents of the United States: William J. Clinton, (1998, Book I, p. 318)]. President Clinton noted that drunk driving remained a serious highway safety problem, costing society thousands of lives and $45 billion every year. *Id.* In an effort to "prevent the many tragic and unnecessary alcohol-related deaths and injuries that occur on our Nation's roads," President Clinton called on the Congress to pass legislation to ensure that 0.08 BAC would become the national legal limit. *Id.* The effort was successful. In October of 2000, the Congress passed, and the President signed into law, the Department of Transportation and Related Agencies Act of 2001, Pub. L. No. 106-346. Among other things, the law required states to implement a 0.08 BAC standard as the legal limit for drunk driving by 2004. States failing to impose that standard risked losing a percentage of federal

highway funds. All 50 states complied, quickly enacting laws establishing 0.08 BAC as the legal limit for impaired driving.

Per se laws such as these were passed, in part, "in response to constant challenges by offenders" in DUI prosecutions that came down to "subjective judgments made by the judge or jury" about the "definition of impairment, being under the influence, or intoxication." National Highway Traffic Safety Administration (NHTSA), Refusal of Intoxication Testing: A Report to Congress, Publication 811098, 2 (September 2008). Indeed, blood alcohol evidence is reliable, easily measured, and does not depend on subjective police observations. The results are not arbitrary. Rather, they treat everyone equally across the board.

Respondent attempts to minimize the importance of blood alcohol evidence in drunk driving prosecutions, contending that the "state can . . . build its case around the arresting officer's observations, the results of one or more field sobriety tests, and a negative inference that can be drawn from the driver's refusal to submit to breath or blood testing." Resp. Br. 37. To support this contention, Respondent cites *South Dakota v. Neville*, 459 U.S. 553 (1983). This reliance is misplaced. In *Neville*, this Court expressly stated that "the inference of intoxication arising from a positive blood-alcohol test is far stronger than that arising from a refusal to take the test." *Id.*, at 564. Indeed, this Court has repeatedly recognized the importance of blood alcohol evidence in drunk driving prosecutions. See, *e.g.*, *Breithaupt v. Abram*, 352 U.S.

432, 439-440 (1957) (a blood test "is a scientifically accurate method of detecting alcoholic content in the blood, thus furnishing an exact measure upon which to base a decision as to intoxication" and that "the issue of driving while under the influence of alcohol can often [by utilizing blood tests] be taken out of the confusion of conflicting contentions."); *Schmerber v. California*, 384 U.S. 757, 771 (1966) ("Extraction of blood samples for testing is a highly effective means of determining the *degree* to which a person is under the influence of alcohol.") (Emphasis added.); *Winston v. Lee*, 470 U.S. 753, 763 (1985) ("Especially given the difficulties of proving drunkenness by other means, . . . results of the blood test were of vital importance if the State were to enforce its drunken driving laws.").

Respondent contends there is no compelling need for chemical test results, asserting that at least half the states prohibit warrantless blood draws in "run of the mill" drunk driving cases. Resp. Br. 31-37. Respondent lists a roster of twenty-five states that are purportedly opposed to warrantless blood testing of drunk drivers. Resp. Br. 31-32 n.9. Interestingly, of the twenty-five states listed by Respondent, fifteen have joined *amici* Delaware, et al., urging this Court to reverse the decision of the Missouri Supreme Court.[3] See *amici* Delaware, et al., Brief.

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[3] These states include: Alabama, Connecticut, Florida, Iowa, Maryland, Michigan, Montana, New Mexico, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, Washington, and Wyoming.

The implied consent law provisions of various states should not be interpreted as a signal that they do not view chemical tests as an important tool in removing drunk drivers from the road. Regardless, even assuming some states have clearly expressed a policy judgment against warrantless blood testing of drunk drivers, the question here is whether the Fourth Amendment forbids such a practice. As *Virginia v. Moore*, 553 U.S. 164 (2008) plainly teaches, state restrictions do not alter Fourth Amendment protections. The relevant inquiry is what the Constitution forbids. To be sure, in *South Dakota v. Neville*, 459 U.S., at 560 n.10, this Court stated that "a person suspected of drunk driving has no *constitutional* right to refuse to take a blood-alcohol test." (Emphasis added.) This Court plainly stated that "*Schmerber* . . . clearly allows a State to force a person suspected of drunk driving to submit to a blood alcohol test." *Id.*, at 559. The right to refuse the blood alcohol test was, as this Court put it, "simply a matter of grace bestowed by the South Dakota legislature." *Id.*, at 565. Certainly, "[a] State is free to prefer one search-and-seizure policy among the range of constitutionally permissible options, but its choice of a more restrictive option does not render the less restrictive ones unreasonable, and hence unconstitutional." *Moore*, 553 U.S., at 174.

C. Privacy Concerns Are Relatively Minor

Respondent is correct that intrusions on bodily integrity go to the very heart of the Fourth Amendment. Resp. Br. 13, 48. To be sure, a compelled blood

test is certainly a bodily intrusion, and, without question, it implicates important privacy interests. Neither Petitioner nor its *amici* suggest otherwise. But this Court has recognized that when there is a legitimate governmental interest involved, such as a prosecution for drunk driving, a compelled blood test is a relatively minor intrusion.

Relying on *Winston v. Lee*, 470 U.S. 753 (1985), Respondent states that "having to submit to a compelled blood test 'perhaps implicated Schmerber's most personal and deep-rooted expectations of privacy.'" Resp. Br. 48 (quoting *Winston*, 470 U.S., at 760). Respondent's reliance on *Winston* is misplaced. In *Winston*, this Court clearly and explicitly reaffirmed that blood tests are a minor intrusion, stating that "*Schmerber* recognized society's judgment that blood tests do not constitute an unduly extensive imposition on an individual's personal privacy and bodily integrity." Respondent further cites *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) to support the proposition that a compelled blood test implicates significant privacy interests. Resp. Br. 48. This reliance is also misplaced. In *Skinner*, this Court once again expressly reaffirmed that "the intrusion occasioned by the blood test is not significant." *Skinner*, 489 U.S., at 625.

Respondent proceeds to distinguish *Skinner* from the case under review, noting that the blood tests at issue in that case were not designed to assist in a criminal prosecution of those tested. Resp. Br. 52. Respondent is absolutely correct in that regard –

the Federal Railroad Administration employees in *Skinner* were not subject to criminal prosecution. That is precisely why the Court upheld the warrantless blood tests in the absence of probable cause. Indeed, the blood tests were upheld without even a required showing of any degree of individualized suspicion. *Skinner*, 489 U.S., at 624. If anything, a compelled blood test of a drunk driver *supported by probable cause* is far more reasonable than a suspicionless compelled blood test. Respondent's further contention that warrantless blood testing of a drunk driver is similar to the warrantless urine testing of pregnant women disapproved by this Court in *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), is equally misplaced. Resp. Br. 52. The searches at issue in *Ferguson* were likewise not supported by probable cause, and thus bear no similarity to the search at issue in this case.

Further discussing privacy concerns, Respondent states that "the automobile exception to the warrant requirement does not extend to compelled blood draws of a vehicle's occupants." Resp. Br. 50-51. Petitioner has never suggested that the warrantless blood test in this case fell under the automobile exception to the warrant requirement, nor has Petitioner remotely suggested that a person is somehow stripped of all Fourth Amendment protections simply by entering a car. The fact remains, however, that driving an automobile is, unquestionably, a pervasively regulated activity. This is certainly a relevant factor to consider when examining the totality of the circumstances of the search at issue here. Such

considerations weigh against the privacy interests of the drunk driver and in favor of the law enforcement interests.

D. A Warrantless Search To Prevent The Destruction Of Evidence Is Reasonable Under The Fourth Amendment

The ultimate touchstone of the Fourth Amendment is the "reasonableness" of the police practice, *Brigham City v. Stuart,* 547 U.S. 398, 403 (2006), and a search or seizure based on probable cause may be conducted without a warrant if the police conduct is reasonable under the circumstances. Furthermore, "[i]t is well established that 'exigent circumstances,' including the need to prevent the destruction of evidence, permit police officers to conduct an otherwise permissible search without first obtaining a warrant." *Kentucky v. King*, 131 S.Ct. 1849, 1853-1854 (2011).

Stressing the importance of the warrant requirement, Respondent cites *Johnson v. United States,* 333 U.S. 10, 13-14 (1948). Resp. Br. 16-17. The warrant requirement, to be sure, is indeed important and essential. Neither Petitioner nor its *amici* suggest otherwise. In *Johnson*, however, the Court recognized that there are "exceptional circumstances" where the warrant requirement may be dispensed with. *Id.*, at 14-15. The Court found in that particular case that such "exceptional circumstances" did not exist, specifically noting that "[n]o evidence or contraband was *threatened* with removal or destruction."

Id. (emphasis added). Respondent proceeds to emphasize the importance of the warrant requirement, citing *Katz v. United States*, 389 U.S. 347 (1967); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Mincey v. Arizona*, 437 U.S. 385 (1978), and *Georgia v. Randolph*, 547 U.S. 103 (2006). Resp. Br. 16-17. Once again, none of these cases involved the imminent destruction of evidence.

In the case under review, everyone agrees the evidence was in the actual process of destruction. Nonetheless, Respondent contends this fact was insufficient to establish exigent circumstances, asserting that the "natural dissipation of alcohol in the blood is . . . very different than other cases where the Court has worried about destruction of evidence." Resp. Br. 13. Relying on *Roaden v. Kentucky*, 413 U.S. 496 (1973), Respondent asserts a drunk driving investigation does not present a "now or never" situation necessary to create exigent circumstances. Resp. Br. 13, 44. Respondent's reliance on *Roaden,* however, is entirely misplaced. In *Roaden* the Court held the warrantless seizure of an obscene film being exhibited to the general public was a form of prior restraint, and for that reason was unreasonable under Fourth Amendment standards. *Id.*, at 504. The Court specifically noted there was no risk of loss of evidence in the case because the films were scheduled for exhibition in a commercial theater open to the public. *Id.*, 506 n.6. Obviously, the whole point of a commercial theater is to preserve the films so that they can be shown time and time again to paying

customers. Thus, there was never even a *risk* of loss of evidence.

Respondent attempts to differentiate the situation presented *Kentucky v. King*, *supra*, contending that the destruction of evidence concept in narcotics cases is distinguishable from the case under review. Resp. Br. 44. Respondent asserts that narcotics cases are distinguishable because "once drugs are flushed down the toilet, they are gone instantly and forever" and that "the prosecution's case often disappears with them." Resp. Br. 13. Thus, if the Court were to adopt Respondent's rationale, exigent circumstances would only exist in destruction of evidence cases if the evidence will be *completely* destroyed during the delay necessary to apply for and obtain a search warrant. This Court has never endorsed such an approach.

A hypothetical example illustrates the flaw with Respondent's test. Assume law enforcement officers, in the course of a narcotics investigation, have set up surveillance on a particular house they suspect may be at the center of a major drug trafficking conspiracy. While conducting surveillance, they observe a large package being delivered to the house. Within minutes, the officers receive a text message from a reliable informant inside the house confirming what the officers suspected – the package contained a very large quantity of heroin. Unfortunately, the informant also advises the officers that the drug traffickers have been alerted to their presence and have begun flushing the heroin down a toilet. The informant

further advises the officers that the quantity of heroin is so large that it will take several hours before the traffickers can dispose of it entirely. Under the Respondent's proposed test, the officers in the field would be forced to make a prediction regarding the length of time it would take to obtain a search warrant. If, for instance, the police think there is a chance they might be able to obtain a telephonic search warrant fairly quickly, say within one hour, the police would be required to sit by and allow heroin to be destroyed while they apply for a search warrant, all the while hoping that the warrant will come through without any unanticipated delays.

The flaws inherent in Respondent's proposed test are further illustrated by examples of its practical application in the context of other crimes as well. For example, suppose that during a white collar crime investigation law enforcement officers find out that the suspect is in his office destroying evidence of a massive fraud he perpetrated. The suspect is methodically and steadily pouring over hundreds of documents and computer files so that he can get rid of evidence of the crime he has committed. Working slowly yet steadily, the suspect is burning incriminating documents and deleting incriminating computer files. Under Respondent's proposed test, law enforcement officers would be forced to evaluate the practicability of obtaining a search warrant before putting an end to the destruction of evidence. To further complicate matters, the officers might even have to consider whether a forensic computer analyst might later be able to retrieve the deleted computer files.

Once again, the ultimate touchstone of the Fourth Amendment is the "reasonableness" of the police practice. *Brigham City v. Stuart,* 547 U.S. 398, 403 (2006). A search or seizure based on probable cause may be conducted without a warrant if the police conduct is reasonable under the circumstances, and "[i]t is well established that 'exigent circumstances,' including the need to prevent the destruction of evidence, permit police officers to conduct an otherwise permissible search without first obtaining a warrant." *King*, 131 S.Ct., at 1853-1854.

In the case under review, it was an indisputable fact that the most reliable and probative evidence of the crime was in the actual process of destruction. The arresting officer clearly had probable cause to believe Respondent was driving drunk, and the search itself was conducted in a reasonable manner. While we do not know exactly how much time it would have taken to apply for and obtain a search warrant, we know for certain that there would have been an inevitable delay. While we do not know exactly how much evidence would have been lost during this delay, we know for certain that the alcohol was being eliminated from his system.

The simple fact remains – this Court has never held that law enforcement officers must put a halt to a criminal investigation when they know, for certain, that important evidence is in the actual process of destruction. This Court has never required the police to put an investigation on hold when it is undisputed that the most reliable and probative evidence of a

crime will continue to be destroyed during the inevitable delay necessary to obtain a search warrant. The judgment of the Missouri Supreme Court should be reversed.

CONCLUSION

For the foregoing reasons and those stated in the petitioner's opening brief, the decision of the Missouri Supreme Court should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 11-1425

In the Supreme Court of the United States

STATE OF MISSOURI, PETITIONER

v.

TYLER G. MCNEELY

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSOURI

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the Fourth Amendment permits a police officer to obtain a blood sample from a driver who has been arrested for driving under the influence of alcohol, without seeking a warrant, because of the natural dissipation of alcohol in the driver's bloodstream.

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In the Supreme Court of the United States

No. 11-1425

STATE OF MISSOURI, PETITIONER

v.

TYLER G. MCNEELY

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSOURI

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether the Fourth Amendment permits a law enforcement officer to obtain a blood sample, without seeking a warrant, from a driver who has been arrested for driving while under the influence of alcohol based upon the natural dissipation of alcohol in the driver's bloodstream. Federal officials routinely make arrests for drunk driving that occurs in national parks and on other federal land. Further, the Department of Transportation, through the National Highway Traffic Safety Administration (NHTSA), has undertaken substantial efforts to reduce the incidence of drunk driving in the United States. NHTSA provides grants to States for impaired-driving prevention, enforcement, and research; conducts research to assist States in identifying new approaches to reduce impaired driving; and collects and maintains data on the effects of

impaired driving. Accordingly, the United States has a substantial interest in the resolution of this case.

STATEMENT

1. On October 3, 2010, shortly after 2 a.m., a Missouri state patrol officer observed respondent speeding and crossing the centerline in his white Ford truck. Pet. App. 4a; J.A. 19. The officer stopped the truck and noticed that respondent displayed several "tell-tale signs of intoxication": his eyes were "glassy and bloodshot" and there was a "strong odor" of alcohol on his breath. Pet. App. 4a; see J.A. 19, 30-31. The officer asked respondent if he had been drinking alcoholic beverages; respondent said he had "drunk a couple of beers." J.A. 20.

The officer asked respondent to step out of his truck. Pet. App. 4a. Respondent was "unstable on his feet" and "swayed while maintaining his balance." J.A. 20; see Pet. App. 24a. The officer administered four standard field sobriety tests; respondent performed poorly on all of them. Pet. App. 4a, 24a; J.A. 20, 31-32. The officer asked respondent to breathe into a portable breath tester, and respondent refused. Pet. App. 4a; J.A. 20, 33. The officer then arrested respondent for driving while intoxicated. Pet. App. 4a; J.A. 20, 33.

The officer placed respondent in his squad car and asked him if he would provide a breath sample at the stationhouse; respondent refused. Pet. App. 4a; J.A. 20, 33. The officer then transported respondent to a local hospital to obtain a blood sample. Pet. App. 5a; J.A. 20. Before taking the sample, the officer informed respondent that under Missouri's implied-consent law, a driver who has been arrested for drunk driving must consent to a chemical test, or he will lose his driver's license for one year and his refusal to consent to the test may be

used against him in a criminal proceeding. Pet. App. 25a; J.A. 34-35, 59; see Mo. Ann. Stat. §§ 577.020, 577.041 (West 2011). Respondent refused to consent to a blood test. Pet. App. 5a; J.A. 35, 73-74.

A trained medical technician took a blood sample from respondent. Pet. App. 5a; J.A. 20. Chemical analysis of the sample revealed that respondent's blood-alcohol content (BAC) was 0.154 percent, well above the State's legal limit of 0.08 percent. Pet. App. 5a, 25a; J.A. 37, 60-61.

The blood sample was taken about 25 minutes after the initial traffic stop. Pet. App. 21a; J.A. 20. The process of obtaining a warrant would have substantially delayed the test; a state patrol sergeant testified that it "usually" takes an extra "hour and a half to two hours" to obtain a warrant for a blood test in a drunk driving case. J.A. 53-54. The sergeant further explained that alcohol is absorbed into a person's bloodstream fairly quickly—typically "before the [person] even leave[s] the bar"—and when the person stops drinking, his BAC will decrease steadily, at a rate of 0.015 to 0.020 percent per hour. J.A. 47-48. At that point, the sergeant explained, the BAC evidence "is being destroyed with each passing minute." J.A. 51.

2. Respondent was charged in state court with driving while intoxicated, in violation of Mo. Ann. Stat. § 577.010 (West Supp. 2010). Pet. App. 23a; J.A. 22-23. This offense was a felony because respondent has two prior convictions for driving while intoxicated. J.A. 22-23.

Respondent filed a suppression motion, arguing that under the Fourth Amendment, the police were required to obtain a warrant before taking the blood sample. J.A. 25-26. The trial court granted the motion. Pet. App.

39a-46a. The court noted that in *Schmerber* v. *California*, 384 U.S. 757 (1966), this Court had upheld the taking of a nonconsensual and warrantless blood sample from a person who had been arrested for drunk driving. Pet. App. 42a. In *Schmerber*, the Court determined that the officer's actions were justified because "the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence," in that "the percentage of alcohol in the blood begins to diminish shortly after drinking stops." 384 U.S. at 770-771 (citation and internal quotation marks omitted).

The trial court recognized that in this case, as in "all cases involving intoxication," respondent's BAC was constantly decreasing as the alcohol in his blood "was being metabolized by his liver." Pet. App. 43a. But the court declined to apply *Schmerber*'s holding, instead limiting it to the particular facts of that case: an accident causing injuries that required immediate medical attention and an on-scene investigation. *Ibid.*[1]

3. The Missouri Court of Appeals determined that the warrantless blood test was permissible under *Schmerber* because delay would risk the destruction of evidence. Pet. App. 23a-38a. The court explained that the evanescent nature of blood alcohol evidence by itself created sufficient exigency for a warrantless blood draw. *Id.* at 33a-34a. The court found "no reason" to require additional facts so long as "the officer had ample cause to reasonably believe [respondent] was under the influence of alcohol and that [his] blood alcohol concentration

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[1] There was a dispute in the courts below about whether Missouri law allowed the officer to obtain a blood sample without consent or a warrant. See Pet. App. 34a-38a, 43a-45a. The Missouri Supreme Court did not resolve that dispute, *id.* at 21a n.9, and it is not before this Court.

would continue to decrease, thus destroying evidence." *Id.* at 33a.

4. The Missouri Supreme Court affirmed the suppression order. Pet. App. 1a-22a. While acknowledging that "the percentage of alcohol in a person's blood begins to diminish shortly after drinking stops," the court decided that that "threat of evidence destruction" does not provide sufficient exigency to justify obtaining a blood sample without a warrant. *Id.* at 2a-3a. In the court's view, *Schmerber* provides a "very limited exception to the warrant requirement," so that the police must obtain a warrant for a blood test unless there are "special facts" that create "an emergency situation," such as a "time delay created by the investigation of the accident as well as the transportation of the defendant to the hospital." *Id.* at 8a-10a; *id.* at 19a-20a.

SUMMARY OF ARGUMENT

The Fourth Amendment permits a law enforcement officer to obtain a blood sample, without seeking a warrant, from a person arrested for driving under the influence of alcohol because the evidence of the driver's intoxication is constantly being destroyed as the alcohol naturally leaves his bloodstream.

A. The touchstone of the Fourth Amendment is reasonableness, and a search or seizure based on probable cause may be conducted without a warrant if the police conduct is reasonable under the circumstances. One circumstance in which this Court has found it reasonable for the police to proceed without a warrant is when a search or seizure is necessary to prevent the imminent destruction of evidence. The exigency provided by the risk of destruction of evidence has justified taking physical samples from a murder suspect, making warrantless entries into homes, searching an arrestee's person and

property incident to arrest, and seizing incriminating evidence found in plain view. In each of those cases, the Court has weighed the government interests and individual privacy interests and concluded that the police behavior was reasonable in the circumstances.

B. This Court conducted that balancing of interests in *Schmerber* v. *California*, 384 U.S. 757 (1966), and concluded that it is reasonable for the police to obtain a blood sample from a suspected drunk driver without a warrant. The Court determined that once a police officer had probable cause to believe a person was driving under the influence of alcohol, so that evidence of intoxication would be found in his bloodstream, the government interests in obtaining that evidence outweighed the driver's privacy interest. The delay associated with obtaining a warrant "threatened the destruction of evidence," the Court explained, because "the percentage of alcohol in the blood begins to diminish shortly after the drinking stops, as the body functions to eliminate it from the system." *Id.* at 770-771 (citation omitted). The Court also noted that the blood test used is "commonplace" and the test was performed "in a reasonable manner" in a hospital environment. *Id.* at 771.

The Missouri Supreme Court erred in limiting *Schmerber* to its specific facts, because the Court's rationale was that the natural dissipation of alcohol in a drunk driver's bloodstream provides sufficient exigency to justify obtaining a blood sample from the driver without seeking a warrant. The Court did not base its holding on how long it would take the police to obtain a warrant or whether the police must spend time on other tasks. And in cases since *Schmerber*, this Court has consistently recognized that *Schmerber* "held that a State may, over the suspect's protest, have a physician

extract blood from a person suspected of drunken driving without violation of the suspect's [Fourth Amendment] rights." *Winston* v. *Lee*, 470 U.S. 753, 755 (1985).

C. States and the federal government have a compelling interest in quickly obtaining blood-alcohol evidence from suspected drunk drivers. Driving while intoxicated remains a serious problem in our society, and every State and the federal government criminalizes this conduct. These criminal laws generally define the offense based on the driver's BAC, which is measured through a chemical test such as a blood test. Time is of the essence in performing such a test because the suspect's BAC is constantly decreasing as the alcohol is naturally eliminated from his system.

The fact that the evidence of intoxication is necessarily leaving the suspect's system provides the required exigency. The police should not have to speculate about how long the alcohol might remain in the suspect's system, how long it might take to obtain a warrant or find a technician to perform the blood test, or how long it might take to complete other investigative tasks.

D. The government's need to promptly obtain blood-alcohol evidence from suspected drunk drivers justifies the intrusion on the driver's privacy interests. Although a blood test involves a bodily intrusion, this Court has characterized it as minimal and commonplace. Blood tests are routinely performed during annual physical examinations, or to obtain a marriage license or enter the armed forces. Moreover, a driver's privacy expectations in this context are reduced by the pervasive regulation of automobile travel and all States' and the federal government's implied-consent laws. Police officers must have the ability to order blood tests in appropriate circumstances to ensure that the roads and highways are

safe. The judgment of the Missouri Supreme Court should be reversed.

ARGUMENT

EXIGENT CIRCUMSTANCES JUSTIFY A WARRANTLESS BLOOD TEST WHEN THE POLICE HAVE PROBABLE CAUSE TO BELIEVE THAT AN INDIVIDUAL HAS BEEN OPERATING A MOTOR VEHICLE UNDER THE INFLUENCE OF ALCOHOL

A. The Risk Of Imminent Destruction Of Evidence May Provide Exigency Sufficient To Permit A Warrantless Search Or Seizure

1. The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated" and that "no Warrants shall issue, but upon probable cause." The Fourth Amendment's text "imposes two requirements": "all searches and seizures must be reasonable" and "a warrant may not be issued unless probable cause is properly established and the scope of the authorized search is set out with particularity." *Kentucky* v. *King*, 131 S. Ct. 1849, 1856 (2011). Although the Amendment does not state when a warrant is required, this Court has "inferred that a warrant must generally be secured" before a search of a home or a person. *Ibid.*

But the "ultimate touchstone" of the Fourth Amendment is the "reasonableness" of the police practice, and in many circumstances it is reasonable for the police to proceed without a warrant. *Brigham City* v. *Stuart*, 547 U.S. 398, 403 (2006). In particular, the Court has recognized that the "exigencies of the situation" may "make the needs of law enforcement so compelling that [a] war-

rantless search is objectively reasonable." *King*, 131 S. Ct. at 1856 (quoting *Mincey* v. *Arizona*, 437 U.S. 385, 394 (1978)). These exigent circumstances include "the need to assist persons who are seriously injured or threatened with such injury," *Brigham City*, 547 U.S. at 403; the "hot pursuit" of a fleeing suspect, *United States* v. *Santana*, 427 U.S. 38, 42-43 (1976); and, as relevant here, the need "to prevent the imminent destruction of evidence," *King*, 131 S. Ct. at 1856 (citation omitted).

2. This Court has permitted the police to conduct warrantless searches and seizures to prevent the destruction of evidence in a variety of contexts. In *Cupp* v. *Murphy*, 412 U.S. 291, 295 (1973), for example, the Court upheld a police officer's decision to obtain fingernail scrapings from a suspect without a warrant. The suspect had voluntarily come to the police station for questioning about his wife's murder. *Id.* at 292. When the police noticed what appeared to be a spot of blood on his hand, the man "put his hands behind his back and appeared to rub them together," then put his hands in his pockets. *Id.* at 292, 296. At that point, the Court explained, the police were justified in immediately taking scrapings from the suspect's fingernails, because they had "probable cause to believe that [the suspect] had committed the murder," the intrusion was "very limited," the evidence was "highly evanescent," and the suspect appeared to be "attempt[ing] to destroy what evidence he could without attracting further attention." *Id.* at 294-296.

The risk of destruction of evidence justifies searches and seizures in a variety of other circumstances. When police officers have the requisite individualized suspicion that evidence will be destroyed, they may make intrusions as significant as entering a dwelling without a war-

rant. See, *e.g.*, *King*, 131 S. Ct. at 1853-1854. The police also may search an automobile when they have probable cause but lack a warrant because the automobile's ready mobility creates a risk of destruction of evidence. *Wyoming* v. *Houghton*, 526 U.S. 295, 304 (1999). The destruction-of-evidence rationale also supports the rules that the police may seize without a warrant incriminating evidence found in plain view, as well as containers and vehicles believed to hold contraband or evidence of a crime. *United States* v. *Place*, 462 U.S. 696, 701-702 (1983); *Carroll* v. *United States*, 267 U.S. 132, 153 (1925). And this Court has approved a limited search incident to an arrest in part because the arrestee may destroy evidence. See, *e.g.*, *Chimel* v. *California*, 395 U.S. 752, 763 (1969).

3. To determine whether a search or seizure without a warrant is reasonable, this Court has weighed "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Scott* v. *Harris*, 550 U.S. 372, 383 (2007) (citation omitted); see, *e.g.*, *Illinois* v. *McArthur*, 531 U.S. 326, 331 (2001) (Court "balance[s] the privacy-related and law enforcement-related concerns"). In *Cupp*, for example, the Court upheld the warrantless taking of fingernail scrapings because it concluded that "the very limited intrusion undertaken" by the police was justified by the "existence of probable cause" to believe the suspect had killed his wife and "the ready destructibility of the evidence" that he was the murderer. 412 U.S. at 296.

In this case, the police officer who arrested respondent for driving under the influence obtained a warrantless blood sample because of the risk that this evidence

of respondent's intoxication would be destroyed if the officer sought a warrant. Whether that police action was reasonable depends upon a weighing of the government's need for the sample and the nature and extent of the intrusion upon respondent's privacy interests.

B. In *Schmerber*, This Court Authorized A Warrantless Blood Test Of A Driver Arrested For Driving Under The Influence Of Alcohol Based On Exigency

1. The Court considered whether the police may take a warrantless blood sample from a suspected drunk driver in *Schmerber* v. *California*, 384 U.S. 757 (1966). The defendant was involved in an automobile accident and was taken to a hospital for medical treatment. *Id.* at 758, 769. The investigating police officer noticed that the defendant smelled of alcohol and had glassy, bloodshot eyes. *Id.* at 768-769. The officer placed the defendant under arrest and asked him to take a "breathalyzer" test; the defendant refused, and so the police officer directed a doctor to take a blood sample from him. *Id.* at 758, 765 n.9. A chemical analysis of the sample confirmed that the defendant was intoxicated. *Id.* at 759.

This Court rejected the defendant's argument that the withdrawal and testing of his blood violated the Fourth Amendment. 384 U.S. at 767-772. The Court determined that taking the blood sample was "plainly" a search and that such an intrusion into the human body ordinarily requires a warrant. *Id.* at 767. But the Court concluded that the officer's decision to proceed without a warrant was "justified in the circumstances" in light of the government's need for the blood sample, the relatively minor intrusion on defendant's privacy interests, and the reasonable manner in which the test was conducted. *Id.* at 767-772.

Beginning with the asserted government interests, the Court found that the officer "plainly" had probable cause to arrest the defendant for driving under the influence of alcohol and that the officer "might reasonably have believed that he was confronted with an emergency" because the "delay necessary to obtain a warrant * * * threatened the destruction of evidence." 384 U.S. at 768-770 (citation and internal quotation marks omitted). The Court observed that "the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system." *Id.* at 770. Because the blood-alcohol evidence was constantly being destroyed, the Court agreed that there was "no time to seek out a magistrate and secure a warrant," "[p]articularly in a case * * * where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident." *Id.* at 770-771.

The Court then considered the intrusion on privacy interests and concluded that it was "satisfied" that the test used to measure the defendant's blood-alcohol level "was a reasonable one." 384 U.S. at 771. The Court explained that obtaining a blood sample is a "highly effective means" of determining "the degree to which a person is under the influence of alcohol." *Ibid.* And such a blood test is "commonplace" in our society; these tests are performed at routine physical examinations and often are prerequisites for obtaining a marriage license, entering military service, or enrolling in college. *Id.* at 771 & n.13. The Court also noted that the "quantity of blood extracted is minimal" and "for most people the procedure involves virtually no risk, trauma, or pain." *Id.* at 771. Moreover, the Court observed that the test was "performed in a reasonable manner," with the sam-

ple "taken by a physician in a hospital environment according to accepted medical practices." *Ibid.*

The Court therefore concluded that the warrantless blood test did not infringe the defendant's Fourth Amendment rights. 384 U.S. at 772. But the Court cautioned that "[t]he integrity of an individual's person is a cherished value of our society," and the Court's acceptance of the blood test—a "minor intrusion[] into an individual's body under stringently limited conditions"—does not establish the constitutionality of "more substantial intrusions, or intrusions under other conditions." *Ibid.*

2. In this case, as in *Schmerber*, a police officer had probable cause to believe that respondent had been driving while intoxicated. Compare Pet. App. 24a (respondent had the "strong odor of intoxicants on his breath" and "glassy and bloodshot" eyes, was "unstable on his feet," and performed poorly on field sobriety tests), with *Schmerber*, 384 U.S. at 769 (officer "smelled liquor on [the defendant's] breath" and noticed that his eyes were "bloodshot," "watery," and "glassy"). Here, as in *Schmerber*, the "threat[] [of] destruction of evidence" exists because respondent's "body was working naturally to expunge the alcohol in his system." Pet. App. 20a; cf. *Schmerber*, 384 U.S. at 770-771. Nonetheless, the Missouri Supreme Court declined to apply the holding of *Schmerber*. In that court's view, a warrantless blood draw from a suspected drunk driver is not allowed unless police face a multi-hour delay caused by an on-scene investigation or the need to obtain medical treatment for injured persons. Pet. App. 8a-10a, 19a-21a.

The Missouri Supreme Court erred in confining *Schmerber* to its precise facts. *Schmerber* upheld a warrantless blood draw from a suspected drunk driver be-

cause any delay risked the destruction of evidence: "the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system," and so the police had "no time to seek out a magistrate and secure a warrant." 384 U.S. at 770-771. The "fact that an accident occurred and that the defendant was taken to the hospital" in *Schmerber* "did not increase the risk that evidence of intoxication would be lost"; the evidence was being lost either way. *State* v. *Bohling*, 494 N.W.2d 399, 402 (Wis.), cert. denied, 510 U.S. 836 (1993). The *Schmerber* Court's observation that police had no time to seek a warrant "particularly in a case such as this" (384 U.S. at 770) recognized the especially acute circumstances in that particular case. But the enhanced risk of lost evidence when police face multiple sources of delay does not defeat the essential risk of lost evidence in *every* drunk-driving case. Even in a routine drunk-driving case, the suspect must be transported from the roadside to a place where a blood sample may be taken by a trained professional, and interrupting that process to obtain a warrant would risk losing the blood-alcohol evidence. *Bohling*, 494 N.W.2d at 402-403.

The Missouri Supreme Court limited *Schmerber* based on the Court's statement that it was "appropriate" for the police to obtain the blood sample without a warrant given the "special facts" of that case. 384 U.S. at 771-772. But the "special facts" that were crucial to the Court's holding were that the officer had probable cause to believe that the test would reveal evidence of intoxication and that the evidence would be destroyed because of the natural dissipation of alcohol from the defendant's body. The *Schmerber* Court did not base its holding on the time it would take to obtain a warrant or complete

other investigative tasks, and any such approach would be impractical and unworkable. See pp. 24-26, *infra*. As the Missouri Supreme Court itself acknowledged, "the exact time that had elapsed was not reflected in the opinion" in *Schmerber*. Pet. App. 21a n.8. The *Schmerber* Court likewise did not suggest that exigency would exist only if the evidence of intoxication was about to be *completely* destroyed. Instead, the Court recognized that evidence was being destroyed every minute. 384 U.S. at 770-771.

The Missouri Supreme Court also was mistaken in reading the *Schmerber* Court's concluding statement to "reject[] a *per se* exigency" rule. Pet. App. 18a. In stating that its decision "in no way indicates that [the Constitution] permits more substantial intrusions, or intrusions under other circumstances," 384 U.S. at 772, the *Schmerber* Court was making the common-sense point that more significant bodily intrusions, or blood tests conducted in circumstances other than a blood test of a suspected drunk driver performed in a medical setting, might be analyzed differently. Indeed, when a search involving a different bodily intrusion (surgical removal of a bullet) reached the Court in *Winston* v. *Lee*, 470 U.S. 753 (1985), the Court noted that the surgery was "an example of the 'more substantial intrusion' cautioned against in *Schmerber*." *Id.* at 755.

3. In its decisions since *Schmerber*, this Court has confirmed that *Schmerber* rested on the conclusion that the natural dissipation of alcohol in the bloodstream provides exigent circumstances that justify a warrantless blood test.

In *South Dakota* v. *Neville*, 459 U.S. 553 (1983), the Court considered whether a state implied-consent law, which requires suspected drunk drivers to submit to a

chemical test and permits their refusal to be introduced at trial, violated a defendant's privilege against compelled self-incrimination. *Id.* at 554. The Court upheld the law, explaining that because "the State could legitimately compel the suspect, against his will, to accede to [a blood] test," it also could "offer[] a second option of refusing the test" and accepting "the attendant penalties." *Id.* at 563-564. A fundamental premise underlying the Court's reasoning was that "*Schmerber* * * * clearly allows a State to force a person suspected of driving while intoxicated to submit to a blood alcohol test." *Id.* at 559. The Court did not suggest that warrantless blood tests of drunk drivers are only allowed when officers face a variety of competing demands in addition to the need to obtain evidence; rather, it accepted that such tests are permissible as a general matter.

The Court characterized *Schmerber* the same way in *Winston* v. *Lee*, *supra*, when it held that officers needed a warrant to order surgical removal of a bullet. The Court stated that *Schmerber* "held that a State may, over the suspect's protest, have a physician extract blood from a person suspected of drunken driving without violation of the suspect's [Fourth Amendment] right." 470 U.S. at 755. The Court contrasted the "commonplace" blood test at issue in *Schmerber* with the "extensive" intrusion and medical risk involved in the surgical removal of a bullet. *Id.* at 761-765. Moreover, the Court made no suggestion that all the particular circumstances in *Schmerber* were necessary to support its conclusion that "the exigent-circumstances exception to the warrant requirement" permits "compell[ing] an individual suspected of drunken driving to undergo a blood test." *Id.* at 759.

The Court took a similar view in *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), when it relied on *Schmerber* to reject a Fourth Amendment challenge to federal regulations requiring toxicological testing of bodily fluids of railroad employees involved in accidents or safety violations. The Court again stated that *Schmerber* "held that a State could direct that a blood sample be withdrawn from a motorist suspected of driving while intoxicated, despite his refusal to consent to the intrusion." *Id.* at 625. And the Court determined that in *Skinner*, as in *Schmerber*, a blood sample "must be obtained *as soon as possible*" after an accident because "alcohol and other drugs are eliminated from the bloodstream at a constant rate." *Id.* at 623 (emphasis added). Immediate blood tests are allowed under *Schmerber*, the Court explained, because "the delay necessary to procure a warrant * * * may result in the destruction of valuable evidence." *Ibid.*

Accordingly, this Court has recognized on numerous occasions that *Schmerber* permits a warrantless blood test of a suspected drunk driver, based solely on the exigency that the human body metabolizes alcohol and eliminates it from a person's system, thus threatening the loss of evidence with every interval of delay.

C. States And The Federal Government Need The Ability To Take A Warrantless Blood Test Of A Suspected Drunk Driver

1. Drunk driving "occurs with tragic frequency on our Nation's highways," and the "carnage caused by drunk drivers is well documented." *Neville*, 459 U.S. at 558. Over 50 years ago, this Court recognized that intoxication is "one of the great causes of the mortal hazards of the road." *Breithaupt* v. *Abram*, 352 U.S. 432, 439 (1957). On numerous occasions since then, this

Court has noted the "[t]he gravity of the drunk driving problem and the magnitude of the State's interest in getting drunk drivers off the road." *City of Indianapolis* v. *Edmond*, 531 U.S. 32, 39 (2000); see *Illinois* v. *Batchelder*, 463 U.S. 1112, 1118 (1983); *Mackey* v. *Montrym*, 443 U.S. 1, 17-18 & n.9 (1979); see also, *e.g.*, *Virginia* v. *Harris*, 130 S. Ct. 10, 11 (2009) (Roberts, C.J., dissenting from denial of certiorari); *Perez* v. *Campbell*, 402 U.S. 637, 657 (1971) (Blackmun, J., concurring).

Despite significant and sustained efforts by the States, the federal government, and private groups, drunk driving has continued to be a serious nationwide problem. In 2010, over 10,000 people were killed in motor vehicle crashes involving alcohol-impaired drivers, which is an average of one death every 51 minutes. NHTSA, *Traffic Safety Facts, 2010 Data: Alcohol-Impaired Driving* (Apr. 2012), http://www-nrd.nhtsa.dot.gov/Pubs/811606.pdf. This number accounts for 31 percent of all traffic-related deaths in the United States. *Ibid.* Hundreds of thousands of people are injured in alcohol-related crashes each year. NHTSA, *Alcohol and Highway Safety: A Review of the State of Knowledge* 35 (Mar. 2011) (*NHTSA Review*) (estimating that 512,000 people were injured in alcohol-related crashes in 2000). Alcohol-related crashes cost our society billions of dollars annually. NHTSA, *The Economic Impact of Motor Vehicle Crashes, 2000*, at 2, 31-42 (May 2002) ($51 billion cost in 2000). At this point, "[n]o one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it." *Michigan Dep't of State Police* v. *Sitz*, 496 U.S. 444, 451 (1990).

2. Every State and the federal government criminalizes driving a motor vehicle while impaired by alcohol.

See NHTSA, *Digest of Impaired Driving and Selected Beverage Control Laws* vii (26th ed. Oct. 2012) (*NHTSA Digest*) (collecting state laws); 10 U.S.C. 911; 18 U.S.C. 13; 36 C.F.R. 4.23. These laws address drunk driving in two ways: by making it illegal to operate a motor vehicle under the influence of alcohol, and by making it *per se* illegal to operate a motor vehicle with a certain BAC. See, *e.g.*, Mo. Ann. Stat. §§ 577.010(1), 577.012(1) (West 2011); see generally *NHTSA Digest* (collecting state laws); 10 U.S.C. 911(a), (b); 32 C.F.R. 234.17(c), 1903.4(b)(1); 36 C.F.R. 4.23(a).

The laws based on BAC originated because numerous studies established that driving performance is "substantially impaired in virtually everyone at BAC levels of .08 g/dL [grams per deciliter, or percent by weight] and higher." *NHTSA Review* 60-73, 167-168. Congress then directed NHTSA to condition federal highway grants on each State's adopting a law providing that any person operating a motor vehicle "with a blood alcohol concentration of 0.08 percent or greater * * * shall be deemed to have committed a per se offense of driving while intoxicated." 23 U.S.C. 163(a); see 23 C.F.R. 1225.1. As a result, all 50 States and the District of Columbia enacted laws making it illegal to operate a motor vehicle with a BAC of 0.08 percent or above. *NHTSA Review* 167. Federal prohibitions on drunk driving likewise rely on the 0.08 standard. See 10 U.S.C. 911(b); 18 U.S.C. 13(a); 32 C.F.R. 234.17(c)(1)(ii), 1903.4(b)(1)(ii); 36 C.F.R. 4.23(a)(2).

NHTSA also has encouraged States to enact laws establishing additional penalties for certain high-risk drivers, such as individuals convicted of operating a motor vehicle with a BAC of 0.15 percent or above. 23 C.F.R. 1313.6(d). Many States now provide for such increased

penalties. See *NHTSA Review* 175 (noting that as of 2005, 32 States and the District of Columbia had enacted such laws).

3. Law enforcement officers have a critical need to obtain BAC evidence from suspected drunk drivers promptly after arrest. Once a police officer has probable cause to believe that a person has been driving under the influence of alcohol, it is likely that a blood test will reveal evidence of intoxication, and "[e]xtraction of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol." *Schmerber*, 384 U.S. at 770-771. Especially now that all States have defined an offense based on BAC, tests that reveal BAC are critical. The police may observe the driver's behavior after he has been stopped and note his performance on field sobriety tests, but that evidence alone may not be sufficient to establish the requisite BAC. See *Lee*, 470 U.S. at 763 ("Especially given the difficulty of proving drunkenness by other means, * * * results of the blood test were of vital importance if the State were to enforce its drunken driving laws.").

Time is of the essence when performing a test to obtain BAC evidence. That is because "the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system." *Schmerber*, 384 U.S. at 770. As a person consumes alcoholic beverages, the alcohol is absorbed into his bloodstream and then the body's natural metabolic processes remove the alcohol from his system. See, *e.g.*, J.A. 47-48 (sergeant's testimony that BAC decreases steadily at a rate of 0.015 to 0.020 percent per hour). Law enforcement faces not merely a *risk* that evidence will be destroyed, but a certainty that it will. Cf.,

e.g., *Richards* v. *Wisconsin*, 520 U.S. 385, 395-396 (1997) (officers may dispense with knock-and-announce procedures when faced with a risk of destruction of evidence). And the suspect's BAC will decrease regardless of what actions the police take and regardless of whether the suspect has any motive or desire to destroy the evidence. See 3 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 5.4(b), at 199 (4th ed. 2004) ("evanescent" character of BAC evidence is "inherent in its nature and does not depend on any motive of the defendant to destroy it").

Police must obtain BAC evidence soon after the driver has been stopped in order to establish that his BAC was above the legal limit when he was driving. Most States, recognizing the impossibility of testing a suspect at the time he was driving, "have drafted their *per se* DWI laws such that the law expressly relates the BAC test back to the time of driving, either by a rebuttable presumption or by the definition of the offense." *State* v. *Mechler*, 153 S.W.3d 435, 445-446 & nn.18-20 (Tex. Crim. App. 2005) (Cochran, J., concurring). Some state statutes define the offense as having a BAC over the allowed limit when tested within a certain period of time after driving, *e.g.*, Ariz. Rev. Stat. Ann. § 28-1381(A)(2) (2012) (two hours); Ga. Code Ann. § 40-6-391(a)(5) (2011) (three hours); while other state statutes provide that BAC evidence taken within a certain period of time is presumed to be the person's BAC at the time he was driving, *e.g.*, Ind. Code Ann. §§ 9-30-6-2, 9-30-6-15(b) (LexisNexis 2010) (three hours); see also Mich. Comp. Laws Ann. § 257.625a(6)(a) (West 2006) (no time limit specified); see generally *Breithaupt*, 352 U.S. at 436 n.3 (noting that some state laws provide that a certain BAC

"gives rise to a presumption that [the driver] was under the influence of intoxicating liquor").

These state laws recognize that delayed testing can significantly prejudice the prosecution's case because critical evidence is being lost as time elapses. The suspect's BAC may slip below the legal limit, or the time elapsed may make it extremely difficult to estimate BAC level at the time the person was driving. Delay also jeopardizes the State's ability to secure a conviction for violation of a high-BAC law, which typically bases enhanced penalties on a BAC of 0.15 percent or above.

4. Respondent does not dispute the inherent evanescence of BAC evidence. Instead, he first contends that blood test evidence is unreliable (Br. in Opp. 8-9) and then argues that delays of up to four hours are tolerable (*id.* at 10-11). He is mistaken on both counts.

As an initial matter, respondent is wrong to suggest that the determination of exigent circumstances requires a "robust scientific inquiry into the complex pharmacokinetic processes governing" BAC. Br. in Opp. 8. All agree that alcohol is eliminated from a person's body through natural metabolic processes. Pet. App. 20a; Br. in Opp. 8-9; Pet. Br. 19-20. Regardless of when a person's BAC is at its peak or how quickly BAC decreases, the fact remains that BAC evidence "is being destroyed with each passing minute." J.A. 51. That natural dissipation of alcohol in the bloodstream provides exigent circumstances that permit the police to obtain a blood sample without a warrant.

Respondent contends that blood-test evidence "taken some time after a defendant has stopped driving" may not be sufficiently probative because it is not "direct evidence of the defendant's BAC at the time of operation," and trying to work backwards from that sample "may

yield questionable results." Br. in Opp. 10 & n.6, 12. Of course the police cannot actually obtain BAC evidence while the suspect is driving, but that does not mean that the police should be forced to wait to obtain it until it is almost destroyed. Rather, as respondent acknowledges, it is important to obtain BAC evidence as soon as possible after the suspect has been driving. *Id.* at 10-11.

Indeed, as respondent notes (Br. in Opp. 10-11), the more time that elapses before the driver is tested, the more difficult it is to determine BAC at the time the suspect was driving. Estimating a suspect's BAC at the time of operation based on a later blood test is generally done using a technique called retrograde extrapolation. This extrapolation depends on a host of variables, many of which may not be known to the police: when the suspect was drinking; what the suspect drank; the number, size, and alcohol concentration of the drinks; whether the suspect consumed any food with the drinks; the suspect's drinking history; and the suspect's gender, weight, and height. Richard Stripp, *Forensic and Clinical Issues in Alcohol Analysis*, in *Forensic Chemistry Handbook* 437-441 (Lawrence Koblinsky ed. 2012). That is not to say that such extrapolation cannot be performed, but simply that it is difficult, particularly as time elapses. *Id.* at 440-441; see Br. in Opp. 10-11 & n.6. Indeed, defense practitioners routinely seek to exploit the vulnerabilities inherent in such extrapolation. See, *e.g.*, Dominick A. Labianca, *Retrograde Extrapolation: A Scientifically Flawed Procedure (DWI)*, The Champion 58 (NACDL Jan.-Feb. 2012). And the uncertainties associated with retrograde extrapolation are one reason why some States permit a chemical test taken

within a certain period of time to establish BAC. See pp. 21-22, *supra*.[2]

Nonetheless, respondent suggests that "a police officer has a *minimum* of four hours to obtain a warrant and perform a blood test," because so long as some alcohol remains in the driver's bloodstream, the government could attempt to work backwards to identify his BAC at the time he was driving. Br. in Opp. 10-11. But respondent himself attacks retrograde extrapolation, and such a delay would make it impossible to comply with state statutes requiring that a chemical test be performed within a certain period of time for the results to form the basis for a *per se* offense. Moreover, this Court has never held that the police may intervene to stop the destruction of evidence only when the destruction of evidence is nearly complete.

5. More fundamentally, a rule that the natural dissipation of alcohol in the bloodstream permits a warrant-

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[2] Respondent contends (Br. in Opp. 8-9) that a BAC obtained from a blood test may be greater than the person's BAC at the time he was driving because his blood could still have been absorbing alcohol when he was driving. That is beside the point. Regardless of when the driver's BAC peaks, once alcohol is ingested, the body begins eliminating it, and that destruction of evidence provides the exigency necessary to justify the warrantless blood test.

In any event, although the rate of alcohol absorption (like the rate of dissipation) varies based on each person's characteristics and circumstances, a person's BAC typically peaks soon after he finishes drinking. See Charles L. Winek et al., *Determination of Absorption Time of Ethanol in Social Drinkers*, 77 Forensic Sci. Int'l 169, 170, 176 (1996) (study of social drinkers revealed that "the peak BAC is reached in less than 30 min[utes]"); American Prosecutors Research Inst., *Alcohol Toxicology for Prosecutors* 14-16 (2003) ("Peak concentrations are generally attained within 30-60 minutes of the cessation of drinking."); J.A. 47-48 (alcohol typically is absorbed "before the [person] even leave[s] the bar").

less blood test of a suspected drunk driver is necessary to provide clear guidance for the police. A police officer in the field simply has no way of accurately knowing at what point in time a suspect's BAC will slip below 0.08 percent; the officer "may not know the time of the suspect's last drink, the amount of alcohol consumed, or the rate at which the suspect will metabolize alcohol." *State* v. *Shriner*, 751 N.W.2d 538, 549 (Minn. 2008), cert. denied, 555 U.S. 1137 (2009). And even if they had that information, police officers have neither the time nor the training to undertake a scientific analysis of how long a suspect might still have alcohol in his system.

Exigent circumstances should not depend on case-by-case determinations of the time it would take to obtain a warrant. The stop may occur at a time of day or night when a prosecutor is not readily available for consultation, and the officer may be some distance away from a magistrate judge who can issue a warrant. In this case, for example, the traffic stop occurred shortly after 2 a.m., and an officer testified that it would typically take one and one-half to two hours to obtain a warrant under these circumstances. J.A. 53-54; cf. *Schmerber*, 384 U.S. at 768-769 (officer saw driver at the hospital "within two hours" of the accident). And the time to obtain a warrant can vary greatly within and among jurisdictions.[3]

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[3] The possibility of obtaining a telephonic warrant does not obviate these concerns. Although many States permit application for a warrant over a telephone or through electronic means, see 2 LaFave § 4.3(c), at 511-512 & n.29 (collecting state laws), some still require the application to be in writing, *e.g.*, Colo. Rev. Stat. § 16-3-303 (2012); or require the applicant to appear in person before a judge, *e.g.*, Mass. Ann. Laws ch. 276, § 2B (LexisNexis 1992); or limit oral warrant applications to certain death or personal-injury cases, *e.g.*, Iowa Code Ann. § 321J.10(3) (West 2005). "[T]he officer facing the need for a telephonic warrant cannot be expected to know how much

Further, an officer may not be able to accurately predict how much time he will need to spend on other investigatory tasks, or how long it will take to obtain a blood sample. The time to obtain the sample will depend on such factors as the distance between the location of the stop and the nearest hospital and whether a medical specialist is immediately available to perform the blood test. An officer should not be forced to "speculate on each of these considerations and predict how long the most probative evidence of the defendant's blood-alcohol level would continue to exist before a blood sample was no longer reliable." *Shriner*, 751 N.W.2d at 549.

D. The Government Need To Perform A Warrantless Blood Test Outweighs The Privacy Interests Of A Suspected Drunk Driver

1. A driver's privacy interest in avoiding a blood test does not outweigh the government's compelling need for BAC evidence. It is certainly true that searches that intrude into an individual's body implicate Fourth Amendment concerns in a way that routine searches of the person or of property do not. See *Lee*, 470 U.S. at 759-760. But whether an individual has a sufficient pri-

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delay will be caused by following the procedures necessary to obtain such a warrant," and BAC evidence will be lost in the meantime. *Shriner*, 751 N.W.2d at 549.

Similarly, Federal Rule of Criminal Procedure 4.1 lists a variety of procedures that must be followed, all of which take time, and "[t]ime is what is lacking" when the police need to test for alcohol in the body. *United States* v. *Reid*, 929 F.2d 990, 993 (4th Cir. 1991); see *United States* v. *Ogbuh*, 982 F.2d 1000, 1003 (6th Cir. 1993) ("on average," 45 minutes to an hour was required to obtain a telephonic warrant). Even to the extent that warrants can be obtained quickly in some circumstances, the range of procedures used and the variety of factors that affect the time to obtain a warrant underscore that exigency should not turn on case-by-case determinations.

vacy and security interest against any particular intrusion of this nature depends on the extent of that intrusion on "personal privacy and bodily integrity" and whether "the procedure may threaten the [individual's] safety or health." *Id.* at 761-762. Thus, while the Court has found some bodily intrusions to be so substantial as to outweigh the State's need for the evidence, see, *e.g.*, *id.* at 766-767 (surgical removal of a bullet under general anesthesia); *Rochin* v. *California*, 342 U.S. 165, 172-174 (1952) (pumping suspect's stomach to obtain drugs), the Court has determined that a blood test is not an intrusion of this order.

Blood tests are "commonplace" in our society. *Schmerber*, 384 U.S. at 771. "The blood test procedure has become routine in our everyday life," whether it is done as a condition for obtaining a marriage license or as part of a routine physical examination. *Breithaupt*, 352 U.S. at 436; see *Schmerber*, 384 U.S. at 771. This Court has noted "society's judgment that blood tests do not constitute an unduly extensive imposition on an individual's personal privacy and bodily integrity." *Lee*, 470 U.S. at 762; see, *e.g.*, *Skinner*, 489 U.S. at 625 ("the intrusion occasioned by a blood test is not significant"). The amount of blood extracted is "minimal," and "for most people the procedure involves virtually no risk, trauma, or pain." *Schmerber*, 384 U.S. at 771; see *Neville*, 459 U.S. at 563 ("The simple blood-alcohol test is * * * safe, painless, and commonplace"); see also James Garriott et al., *Garriott's Medicolegal Aspects of Alcohol* § 15.3(G), at 409-412 (5th ed. 2008) (test typically involves taking two tubes of blood, for a combined total of 20 milliliters, or less than one ounce). Accordingly, blood tests for intoxication "do not constitute an un-

duly extensive imposition on an individual's privacy and bodily integrity." *Skinner*, 489 U.S. at 625.

2. Moreover, a motorist arrested for driving under the influence of alcohol has a significantly reduced expectation of privacy in avoiding a blood test. First, as the Court has repeatedly observed, given the pervasive regulation of motor vehicles and traffic, drivers' "expectation of privacy in an automobile and of freedom in its operation are significantly different from the traditional expectation of privacy and freedom in one's residence." *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 561 (1976). Because motor vehicles are "the subject of pervasive regulation by the State," "[e]very operator of a motor vehicle must expect that the State, in enforcing its regulations, will intrude to some extent upon that operator's privacy." *New York* v. *Class*, 475 U.S. 106, 113 (1986); see, *e.g.*, *South Dakota* v. *Opperman*, 428 U.S. 364, 368 (1976) ("Automobiles * * * are subjected to pervasive and continuing governmental regulation and controls.").

But beyond this general reduction of privacy in the automobile context, drivers' privacy interests in this particular context are shaped by the state and federal implied-consent laws. These laws, which have been adopted by all States and the federal government, typically provide that a driver consents to a chemical test to determine BAC in the event that a police officer arrests him for drunk driving or has probable cause to do so. See Mo. Ann. Stat. §§ 577.020, 577.041 (West 2011); see also 18 U.S.C. 3118; 32 C.F.R. 234.17(c)(3), 1903.4(b)(3); 36 C.F.R. 4.23(c); *NHTSA Digest*, *supra*; Michele Fields, *Legal and Constitutional Issues Related to Detection*, in *Issues and Methods in the Detection of Alcohol and Other Drugs* C7 (Sept. 2000). Implied-consent

laws place a motorist on notice that, as a condition of obtaining the privilege to drive, he implicitly consents to submit to a chemical test to determine whether he is intoxicated. While the existence of implied-consent laws is not dispositive of the constitutional question, it underscores that a driver's privacy expectations are shaped by society's recognition that the paramount interest in highway safety can justify actions that might not be allowed in other contexts.

3. Of course, as this Court recognized in *Schmerber*, a blood test for evidence of intoxication must be conducted "in a reasonable manner." 384 U.S. at 771. In that case the blood "was taken by a physician in a hospital environment according to accepted medical practices." *Ibid.* In this case, a trained medical technician took a blood sample from respondent at a hospital. Pet. App. 5a; J.A. 20. Nothing suggests that the test was conducted in any manner that increased the "risk of infection and pain." *Schmerber*, 384 U.S. at 772.[4]

4. When the minimal intrusion occasioned by the blood draw is weighed against the government's compelling need for BAC evidence, the conclusion is the same as in *Schmerber*: once the police have probable cause to believe that an individual has been driving while intoxicated, so that a blood test likely will provide evidence of intoxication, it is reasonable for the police to obtain the blood sample without first seeking a warrant.

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[4] At least two states, Arizona and Utah, have provided medical training to law enforcement officers so that they are able to draw blood from individuals arrested for impaired driving at the stationhouse. See NHTSA, *Use of Warrants for Breath Test Refusal: Case Studies* 6-13, 26-31 (2007). Such an approach has the potential to save the time and expense of transportation to a medical facility and eliminate the need for medical personnel to testify at trial. *Ibid.*

This is not to say that police will conduct blood tests of every drunk driver. An officer who stops a person on suspicion of drunk driving typically observes the driver's behavior and appearance, and then asks the driver to participate in a series of standard field sobriety tests. International Ass'n of Chiefs of Police, *Manual of Police Traffic Services Policies and Procedures*, 1.6 (July 2004); NHTSA, *DWI Detection and Standardized Field Sobriety Testing: Student Manual* VII-1 to VII-7 (2004). If the driver performs poorly on those tests, the officer may ask to perform a chemical test to measure the driver's BAC. Fields C7. Numerous state laws regulate the types of chemical tests that may be given, when they may be given, whether drivers may refuse such tests, and whether a refusal may be introduced at trial as evidence of guilt. See, *e.g.*, Br. in Opp. 14 n.10.[5]

Which test the officer will use to measure BAC often depends on the circumstances. The most common way to measure BAC is to use a breath-testing device. See Stripp 446-447. These devices are commonly used because they can be performed by police officers on the scene or at the stationhouse and they provide immediate and accurate results. *Ibid.*[6] But if a driver is unwilling

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[5] Respondent suggests in passing (Br. in Opp. 11 n.8) that whether exigent circumstances justify obtaining a warrantless blood sample from a suspected drunk driver depends upon whether police have "less intrusive means of testing BAC." This case does not present that issue, because respondent refused a breath test and nothing suggests the police had another way to obtain BAC evidence.

[6] Officers may perform preliminary breath tests (to establish probable cause) and evidential breath tests (to obtain evidence for trial). Fields C4-C8. Evidential breath-testing devices typically are larger, more sophisticated, and more carefully calibrated than preliminary breath-testing devices. *Id.* at C7; see, *e.g.*, Alan Wayne Jones & Derrick J. Pounder, *Update on Clinical and Forensic Analysis of Alco-*

or unable to participate in a breath test, the officer may need to obtain BAC evidence another way, such as through a blood test. Blood tests are typically more time-intensive and costly than breath tests, because officers generally transport the driver to a medical setting for testing, laboratory analysis is required to obtain the results, and the evidence may require use of medical experts at trial. Steve Simon, *Evidence of Alcohol and Drug Impairment Obtained After Arrest*, in *Issues and Methods in the Detection of Alcohol and Other Drugs* G8-G9. But blood tests are critical in cases (like this one) where a person suspected of drunk driving refuses to provide a breath sample.[7] Accordingly, the police must have the flexibility to order a blood test of a suspected drunk driver without a warrant.

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hol, in *Forensic Issues in Alcohol Testing* 35-37 (Steven B. Karch ed. 2008).

Some police departments use handheld passive alcohol sensors that "draw[] in a mix of expired and environmental air from in front of a person's face" and do not depend on a suspect's voluntary cooperation. *NHTSA Review* 190-191. These devices "provide a good estimate of whether a driver has been drinking" but do not measure BAC accurately enough to provide evidence for trial. *Id.* at 190.

[7] BAC also can be measured through a person's urine or saliva, but these methods are not commonly used because they are not as readily available and easy to administer as breath tests and are typically less reliable than blood tests. Stripp 450.

CONCLUSION

The judgment of the Missouri Supreme Court should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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No. 11-1425

RECORD
AND
BRIEF

In The
Supreme Court of the United States

STATE OF MISSOURI,

Petitioner,

v.

TYLER G. McNEELY,

Respondent.

On Writ Of Certiorari To The Missouri Supreme Court

BRIEF OF DELAWARE, ALABAMA, ARKANSAS, COLORADO, CONNECTICUT, DISTRICT OF COLUMBIA, FLORIDA, GUAM, IDAHO, ILLINOIS, INDIANA, IOWA, LOUISIANA, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, NEW JERSEY, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, WASHINGTON, WISCONSIN, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE

Drunk driving is a serious public health hazard. Indeed, this Court has noted the "tragic frequency" with which drunk drivers cause frightful "carnage." *South Dakota v. Neville,* 459 U.S. 553, 558 (1983). Even more, as this Court's cases have repeatedly emphasized, "[t]here is no question that drunk driving is a serious and potentially deadly crime." *Virginia v. Harris,* 130 S. Ct. 10, 11 (2009) (Roberts, C.J., dissenting from denial of certiorari). Thus, it is incontestable that the Amici States have an overwhelming interest in enforcing their laws against drunk driving and effectively prosecuting those who commit that crime. *Michigan Dep't of State Police v. Sitz,* 496 U.S. 444, 451 (1990) ("No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it. Media reports of alcohol-related death and mutilation on the Nation's roads are legion."); *see also State v. Cocio*, 709 P.2d 1336, 1342 (Ariz. 1985) ("Drunk driving has become a problem of epidemic proportion in Arizona and other states throughout the country, and must be effectively dealt with to satisfy the public outcry against this crime." (citations omitted)).

"'[E]ssential to the guid[ance of the Amici States'] police officers,'" who investigate this crime and must collect evidence of it – often in the late night or wee hours of the morning – is "'[a] single familiar standard'" for the seizure of blood samples from impaired drivers. *New York v. Belton*, 453 U.S. 454, 458 (1981) (quoting *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979)).

The question presented in this case focuses on what is reasonable under the Fourth Amendment and promotes the amici states' "essential interest in [a] readily administrable rule[ ]" for these seizures. *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001); *Florence v. Board of Chosen Freeholders*, 132 S. Ct. 1510, 1522 (2012) ("Officers who interact with those suspected of violating the law have an 'essential interest in readily administrable rules.'") (quoting *Atwater*). With a duty to enforce their criminal laws and to provide the guidance needed by law enforcement, Delaware, the other 31 Amici States, the District of Columbia, and the Territory of Guam respectfully submit this brief in support of petitioner "[i]n order to establish the workable rule this category of cases requires." *Belton*, 453 U.S. at 460.

STATEMENT OF THE CASE

At 2:08 a.m. on October 3, 2010, Missouri State Highway Patrol Corporal Mark Winder observed Tyler McNeely speeding. J.A. 19, 29, 30. Before he was able to pull him over, Corporal Winder observed McNeely crossing the center line of the road three times. J.A. 19. When he made contact with McNeely, the patrolman detected slurred speech, "a really strong odor of intoxicants," and that "[McNeely's] eyes were glassy and bloodshot." J.A. 31. McNeely admitted he was coming from a bar, but claimed he had only a couple of beers. J.A. 20. When Corporal Winder asked him to step out of the vehicle, McNeely was

unstable on his feet and swayed while maintaining his balance. J.A. 20.

Corporal Winder administered four field sobriety tests to McNeely, who performed "very poorly" on each of them. J.A. 31-32. McNeely refused to take a portable breath test at the roadside and was subsequently placed under arrest for driving while intoxicated.[1] J.A. 33.

Corporal Winder began to transport McNeely to the Cape Girardeau County Jail to administer a breath test, but McNeely stated he would refuse to take a breath test at the sheriff's office. J.A. 33. In turn, the patrolman transported McNeely to the St. Francis Medical Center Lab to obtain a blood sample. J.A. 20, 33-34.

Corporal Winder read McNeely the Missouri Implied Consent and asked that he provide a blood sample. J.A. 20, 34. McNeely refused. J.A. 35. The patrolman then informed McNeely that, pursuant to Missouri law, he was going to obtain the blood sample against his refusal. J.A. 34-35. At that point, a lab technician withdrew a blood sample from McNeely and Corporal Winder immediately took possession of it. J.A. 20. The patrolman transported McNeely to the Cape Girardeau County Jail. J.A. 20, 35. After arriving at the jail, Corporal Winder again read McNeely

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[1] McNeely had two prior drunk driving convictions and was, therefore, charged with a class D felony under Missouri law. J.A. 20-23.

the Missouri Implied Consent and asked that he submit to a breath test. McNeely again refused. J.A. 20, 35-36. The analysis of McNeely's sample taken at the medical center showed a blood-alcohol level of 0.154 g/dL or nearly twice the legal limit. J.A. 36-37, 60.

Corporal Winder did not attempt to obtain a search warrant before directing the hospital lab technician to draw the sample of McNeely's blood. Pet. App. 4a-5a, 40a. Obtaining a search warrant in the middle of the night in Cape Girardeau County, Missouri, involves a delay, on average, of approximately two hours. J.A. 53-54. Alcohol in the bloodstream is eliminated at a rate of between .015 and .020 g/dL per hour. J.A. 47-48.

McNeely moved to suppress the results of the blood test as a violation of his Fourth Amendment rights. J.A. 25-26. The trial court sustained the motion. Pet. App. 46a. The State brought an interlocutory appeal and the Missouri Court of Appeals determined that the trial court erred in granting McNeely's suppression motion. Pet. App. 38a. Because the state court of appeals also believed its finding would involve a significant departure from current state case law, and that the issues involved were of "general interest and importance," it transferred the case to the Missouri Supreme Court. *See* MO. SUPR. CT. R. 83.02; MO. CONST. art. V, § 10. The state supreme court affirmed the trial court's judgment granting suppression. Pet. App. 21a.

SUMMARY OF THE ARGUMENT

The nonconsensual warrantless withdraw of Tyler McNeely's blood immediately after he had been arrested for driving under the influence, when such sample was obtained to preserve and provide evidence of his blood alcohol content, did not violate the Fourth Amendment. The reasonableness of this seizure is grounded in two "specifically established and well-delineated exceptions" to the warrant requirement: (1) the search-incident-to-arrest exception; and (2) the exigent circumstance exception. Both of these exceptions are at work in the drunk-driving blood draw context; and both are even more compelling now than when this Court decided *Schmerber v. California*, 384 U.S. 757 (1996).

This is so, in part, because as of 2005, all States, the District of Columbia, Guam, and Puerto Rico have enacted *illegal per se* laws, making it illegal to operate a motor vehicle when the person's blood alcohol content ("BAC") is at or above .08 g/dL. Now it is the offender's BAC – the numerical quantification of the *amount* of alcohol in the driver's blood – that is the critical element of the offense in a *per se* prosecution, as opposed to merely evidence used to establish impairment. And as is well-accepted, the actual numerical value quantifying one's alcohol content, which is ***the*** element of the *per se* crime, dwindles with each moment that passes before sample collection. It is, therefore, imperative that a blood sample be obtained at the earliest opportunity after the driver has been arrested.

First, when a police officer makes a constitutionally valid arrest, it is reasonable under the Fourth Amendment for the officer to search the person arrested as an incident to that arrest. The areas to be searched beyond those normally within the scope of a search incident to arrest may be expanded when it is "*reasonable to believe* evidence relevant to the crime of arrest might be found" there. Probable cause sufficient to lawfully arrest one for driving while intoxicated is perforce probable cause to believe evidence of the intoxicant will be found in his bloodstream when arrested. The police are therefore justified in immediately obtaining a sample of that blood as an incident to that arrest.

Second, a well-settled exception to the Fourth Amendment's warrant requirement allows police to conduct warrantless searches based on probable cause if exigent circumstances require immediate action. A warrantless search conducted pursuant to that exception is reasonable if the exigency arises from the "imminent destruction of evidence." No circumstance could be more readily understood to involve *imminent* destruction of evidence than the natural metabolism of alcohol within one's blood. There simply is no halting it; it occurs automatically. Under normal circumstances, as much as one-quarter of the alcohol content needed to prove a *per se* violation is gone within an hour of when the drunk driver is taken off the road. And that alcohol level will continue diminishing unabated until it has disappeared. In terms of a *per se* impaired driving offense, that critical number drops with each moment of delay.

Thus, the Court should adopt as a rule that probable cause supporting a lawful arrest for driving while under the influence establishes the authority to obtain a blood sample incident to that arrest as evidence of that specific crime. That is the "workable rule" this category of cases requires. And it is a rule supported by the single exigency always present in these cases. The States' interest in fairly and accurately determining guilt or innocence for this serious crime – an interest "of great importance" – here outweighs an individual's interest in avoiding the "slight intrusion" involved in halting that evidence destruction by obtaining a blood sample.

ARGUMENT

I. Withdrawal of a Blood Sample From an Arrested Drunk Driver is a Permissible Search Incident to Arrest Under this Court's Emergent Jurisprudence Defining that Exception to the Warrant Requirement.

A. Factors extant when Corporal Winder had the hospital draw McNeely's blood sample are common and illustrate well some of the guiding principles to resolution of the question presented here.

This case presents the Court with a discrete, recurring and significant issue of Fourth Amendment

law: whether a law enforcement officer, without violating the Fourth Amendment, may obtain a nonconsensual and warrantless blood sample from a drunk driver in the run-of-the-mill drunk-driving case. At the heart of this particular matter is the Missouri Supreme Court's interpretation of this Court's decision in *Schmerber v. California*, 384 U.S. 757 (1966).

Because this case involves only the lack of a warrant, the following factors, which were present here, are presumed to exist and guide the answer to the question presented:

(1) It is beyond dispute that driving is a highly-regulated, dangerous activity and that the States have a compelling interest in maintaining the safety of their highways;[2]

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[2] *Delaware v. Prouse*, 440 U.S. 648, 658 (1979) ("[W]e are aware of the danger to life and property posed by vehicular traffic and of the difficulties that even a cautious and an experienced driver may encounter. We agree that the States have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and hence that licensing, registration, and vehicle inspection requirements are being observed." (footnote omitted)); *Breithaupt v. Abram*, 352 U.S. 432, 439 (1957) ("The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield. The States, through safety measures, modern scientific methods, and strict enforcement of traffic laws, are using all reasonable means to make automobile driving less dangerous." (footnote omitted)).

(2) The process for obtaining a blood sample to quantify intoxicant level does not differ from a standard blood test administered for medical purposes;[3]

(3) A blood sample is/will be obtained only when there is probable cause to arrest for driving under the influence; and

(4) Evidence of intoxicants begins to diminish almost immediately and continues to disappear over time as normal bodily processes occur.[4]

Again, this case presents the *constitutional* question of whether obtaining a blood sample incident to a drunk driving arrest by state police officers violates the Fourth Amendment when that seizure is based upon probable cause but with neither the driver's consent nor a warrant. To be sure, the States place a multitude of their own restrictions on the taking of blood samples from drunk drivers. *See, e.g.*, Brf. in Opp. at 14 n.10. But these state rules must not be elevated to constitutional surrogates to the standard of reasonableness embodied in the Fourth Amendment. Constitutionalizing those state rules is simply unwarranted. *See Virginia v. Moore*, 553 U.S. 164,

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[3] Michael A. Correll, *Is There a Doctor in the (Station) House?: Reassessing the Constitutionality of Compelled DWI Blood Draws Forty-Five Years After* Schmerber, 113 W. VA. L. REV. 381, 388 (2011).

[4] *Schmerber*, 384 U.S. at 770 ("[T]he percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system.").

171 (2008) ("Our decisions counsel against changing th[e constitutional reasonableness] calculus when a State chooses to protect privacy beyond the level that the Fourth Amendment requires. We have treated additional protections exclusively as matters of state law.").

As with so much of this Court's Fourth Amendment jurisprudence, there exists no categorical bar to the noncensensual warrantless seizure of a blood sample from a drunk-driving arrestee. Instead, any claimed unreasonableness attaching to a warrantless seizure of this type of evidence can be overcome by a showing of one of the "specifically established and well-delineated exceptions" to the warrant requirement. *Katz v. United States*, 389 U.S. 347, 357 (1967). Two are at work here: (1) the search-incident-to-arrest exception; and (2) the exigent circumstance exception. And in the drunk-driving blood draw context, those two, since *Schmerber*, have been viewed always as acting in concert and have each become more compelling justifications for the immediate warrantless seizure of that evidence. 3 W. LaFave and D. Baum, SEARCH AND SEIZURE, § 5.3(c) (4th ed. 2011). "In order to establish the workable rule this category of cases requires," *New York v. Belton*, 453 U.S. 454, 460 (1981), this Court, if it is believed not to have already done so in *Schmerber*, should now state a constitutional rule that the Fourth Amendment categorically permits the warrantless seizure of a blood sample from a driver incident to the lawful arrest of that driver for driving under the influence.

B. Today's impaired driving laws are far different than those under which this Court has previously examined seizures of blood samples; it is not merely alcohol presence that matters, but quantification that is critical.

Criminal penalties have been associated with impaired driving for over 100 years. Early statutes prompted a subjective assessment of impairment and were difficult to prove. Jennifer L. Pariser, *In Vino Veritas: The Truth About Blood Alcohol Presumptions in State Drunk Driving Law*, 64 N.Y.U. L. REV. 141, 142 (1989). These statutes required proof that a subject was, due to the consumption of an impairing substance such as alcohol, less able to safely operate a motor vehicle. Mark Feigl, *DWI and the Insanity Defense: A Reasoned Approach*, 20 VT. L. REV. 161, 165-66 (1995). Technological advances over the first half of the 20th century led to the development of scientifically reliable instruments capable of precisely determining a subject's BAC at a given time. *Id.* at 165-66 ("It was not until after World War II and the advent of chemical tests of bodily substances for alcohol that drinking and driving statutes became easier to enforce."). The value of these devices in the prosecution of driving under the influence offenses was readily apparent, and many States adopted statutes which created a presumption of impairment when an individual was found to have a particular BAC at or within a specified time of driving a motor vehicle. *Id.* at 166 ("The early blood alcohol content (BAC) statutes adhered to the American Medical

Association's policy that individual's with BACs of under .05 percent were presumed not to be under the influence. . . ."). When *Schmerber* was decided in 1966, these "presumption" statutes were prevalent across the country.

The early 1980s saw a dramatic increase in public awareness of the dangers created by impaired drivers. Flowing from the work of Mothers Against Drunk Driving ("MADD") and Students Against Drunk Driving ("SADD"), the Alcohol Traffic Safety – National Driver Register Act of 1982 encouraged the development of state statutes assigning *per se* thresholds for impaired driving prosecutions through federal incentives. *Id.* Thereafter, States modified existing statutes to add *per se* violations. *See, e.g., State v. Nesmith*, 276 P.3d 617, 627-28 (Haw. 2012) (discussing legislative history of Hawaii's *per se* driving under the influence statute). These *per se* laws define the offense of DUI in terms of the BAC, not in terms of the individual's intoxication. *Id.* Thus, the prosecution need only show that the defendant was driving on a public highway and that she had a BAC above that jurisdiction's prohibited level, commonly .08 to .10 percent, in order to convict her under the statute. *Id.*

In 2000, President Clinton signed legislation with a clear mandate: implement a *per se* statute with a threshold BAC of .08 or risk losing a percentage of federal transportation funding. Amanda Staples, *Another Small Step in America's Battle Against Drunk Driving: How the Spending Clause Can Provide*

More Uniform Sentences for Drunk-Driving Fatalities, 46 NEW ENG. L. REV. 353, 364 n.96 (2012). "As of 2005, all States, the District of Columbia, and Puerto Rico had enacted *illegal per se* laws, making it illegal to operate a motor vehicle when the person's BAC is at or above .08 g/dL, the quantity of alcohol in the blood." U.S. Dep't of Trans., Nat'l Highway Traffic Safety Admin., *Digest of Impaired Driving and Selected Beverage Control Laws*, vi (26th ed. Oct. 2012) (hereinafter NHTSA), *available at* www.trb.org/Main/Blurbs/167977.aspx; *see also* Staples, 46 NEW ENG. L. REV. at 364 ("Since 2005, all fifty states have imposed a .08 BAC as the *per se* standard for drunk driving. After this legislation was implemented, drunk-driving fatalities fell nationwide from 16,885 in 2005 to 10,839 in 2009."). "To secure a conviction for [a] '*per se* DUI' offense, the prosecution no longer ha[s] to prove the accused driver was actually impaired at the time of the offense, but only that he drove with a blood-alcohol level at or exceeding" a defined threshold – .08 – at or within a defined period following driving. *People v. McNeal*, 210 P.3d 420, 426 (Cal. 2009). Thus, an offender's BAC – the numerical quantification of the *amount* of alcohol in the driver's blood – is the critical element of the offense in a *per se* prosecution as opposed to merely evidence used to establish impairment.

Clearly, establishing an offender's BAC as close in time to the act of driving is critical to a *per se* prosecution. This consideration is further heightened

in States that have statutory aggravating enhancements based on proof of a greater alcohol content. In some jurisdictions, a heightened BAC results in a greater charge,[5] while others provide harsher penalties upon conviction of the base offense.[6] Thus, to charge

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[5] *See, e.g.*, ARIZ. REV. STAT. ANN. § 28-1382 (2012) (The crime of "Driving or actual physical control while under the extreme influence of intoxicating liquor" is established where an offender has an alcohol concentration of .15 or more within 2 hours of driving); MINN. STAT. § 169A.26 (2012) (establishing charge of "Third Degree Driving While Impaired" where an aggravating factor – such as an alcohol concentration greater than .20 – is present); MONT. CODE ANN. § 61-8-465 (2011) (establishing charge of "Aggravated DUI" where alcohol concentration is .16 or more); N.H. REV. STAT. ANN. § 265-A:3 (2012) (establishing charge of "Aggravated Driving While Intoxicated" where offender has, among other things, an alcohol concentration of .16 or more); N.M. STAT. ANN. § 66-8-102D (2012) (establishing charge of "Aggravated Driving While Under the Influence of Intoxicating Liquor or Drugs" where an offender has an alcohol concentration of .16 or more within three hours of driving).

[6] *See, e.g.*, D.C. CODE § 50-2201.05 (2011) (providing mandatory incarceration where an offender has an alcohol concentration greater than .20); IDAHO CODE ANN. § 18-8004C (2012) (providing sentencing enhancements for "excessive alcohol concentration" when an offender has an alcohol concentration greater than .20); LA. REV. STAT. ANN. § 14:98(B)(2)(a) (2012) (providing mandatory incarceration where an offender has an alcohol concentration greater than .15); ME. REV. STAT. tit. 29, § 2411 (2011) (providing mandatory incarceration where an offender has an alcohol concentration greater than .15); OKLA. STAT. tit. 47, § 11.902 (2012) (providing sentencing enhancements for "aggravated driving under the influence" where a convicted offender is found to have an alcohol concentration of .15 or more); OR. REV. STAT. § 813.010(6) (2012) (providing a sentencing enhancement where an offender has an alcohol concentration of .15 or more); TENN. CODE ANN. § 55-10-403

(Continued on following page)

and punish an offender for the crime committed, the sampling must be done as soon as possible after driving to determine the offender's alcohol concentration.

C. Obtaining an immediate and warrantless blood sample from a drunk-driving arrestee is a valid search incident to arrest.

"The touchstone of [this Court's] analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security,'" *Pennsylvania v. Mimms*, 434 U.S. 106, 108-09 (1977) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 (1968)), and that reasonableness "depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.'" *Mimms*, 434 U.S. at 109 (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975)); *see also Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) ("[T]he ultimate touchstone of the Fourth Amendment is 'reasonableness. . . .'"). The probable cause

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(2012) (providing sentencing enhancements where an offender has an alcohol concentration of .20 or more); VA. CODE ANN. § 18.2-270 (2012) (enhanced penalties where alcohol concentration is .15 or greater); WASH. REV. CODE § 46.61.5055 (2012) (enhanced penalties where alcohol concentration is at least .15); WIS. STAT. § 346.65(2)(g) (2012) (enhanced penalties where alcohol concentration is .17 or greater).

standard emblemizes Fourth Amendment reasonableness, "represent[ing the] necessary accommodation between the individual's right to liberty and the State's duty to control crime." *Gerstein v. Pugh*, 420 U.S. 103, 112 (1975).

The probable cause standard "has roots that are deep in our history." *Henry v. United States*, 361 U.S. 98, 100 (1959). It reflects the "ancient common-law rule" that warrantless arrests were permissible if there was reasonable ground to believe a crime was committed. *United States v. Watson*, 423 U.S. 411, 418 (1976); *Atwater v. City of Lago Vista*, 532 U.S. 318, 327-39 (2001). The probable cause test also comports with "traditional standards of reasonableness." *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999). In turn, it is now beyond peradventure that, "[a] warrantless arrest of an individual . . . is consistent with the Fourth Amendment if the arrest is supported by probable cause." *Maryland v. Pringle*, 540 U.S. 366, 370 (2003); *Virginia v. Moore*, 553 U.S. 164, 177 (2008) ("[W]e have equated a lawful arrest with an arrest based on probable cause. . . .").

When a police officer makes a constitutionally valid arrest, it is reasonable under the Fourth Amendment for the officer to search the person arrested as an incident to that arrest. The propriety of such searches was "always recognized under English and American law" and "has been uniformly maintained in many cases." *Weeks v. United States*, 232 U.S. 383, 392 (1914). But when addressing the considerations

underlying the search-incident-to-arrest doctrine in *Schmerber*, this Court concluded then:

> Whatever the validity of these considerations in general, they have little applicability with respect to searches involving intrusions beyond the body's surface. The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is immediate search.

384 U.S. 757, 769-70 (1966).

Importantly, this Court then rejected the notion of administering a blood test upon only the "mere chance" of obtaining evidence, requiring instead that there be "clear indication" that relevant evidence would be found. *Id.* The Court explained shortly thereafter, however, that "[a] custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification." *United States v. Robinson*, 414 U.S. 218, 235 (1973). And since *Robinson* the Court clarified, that "[w]ith rare exceptions," the reasonableness of a search or seizure under the Fourth Amendment "is not in doubt where [it] is based upon probable cause." *Whren v. United States*, 517 U.S. 806, 817 (1996).

Those "rare exceptions" or certain "additional justification[s]" in the search-incident-to-arrest context have evolved to be understood as limiting principles for those circumstances in which the scope of the search expands to include areas not common or necessary for the average arrest. *See Schmerber*, 384 U.S. at 769 (in discussion of Schmerber's Fourth Amendment claim, "the mere fact of a lawful arrest does not end our inquiry"); *see also United States v. Edwards*, 415 U.S. 800, 808-09 (1974) ("While the legal arrest of a person should not destroy the privacy of his premises, it does – for at least a reasonable time and to a reasonable extent – take his own privacy out of the realm of protection from police interest in weapons, means of escape, and evidence." (citation omitted)). And what has emerged therefrom, is a doctrine that calls for an articulable factor that justifies broadening the areas searched beyond those of the normal traditional search-incident-to-arrest.

A police incursion into an area where one's "privacy interest" is "important and deserving of constitutional protection" is constitutionally permissible, however, when it is "'*reasonable to believe* evidence relevant to the crime of arrest might be found.'" *Arizona v. Gant*, 556 U.S. 332, 343-45 (2009) (emphasis added) (quoting *Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring)). In the vast majority of cases, as when a driver is arrested for a garden variety traffic violation, there will be no reasonable basis to believe his or her blood contains relevant evidence. But, not so here. When one has been

or can be validly arrested for driving under the influence of intoxicants, the offense of arrest itself supplies the requisite "evidentiary interest" in obtaining his blood sample. *Gant*, 556 U.S. at 347.

"Weighed against [an] individual['s privacy] interests is the community's interest in fairly and accurately determining guilt or innocence": an interest "of great importance." *Winston v. Lee*, 470 U.S. 753, 762 (1985). Although this Court has found that many Fourth Amendment situations are not amenable to bright-line rules, *see United States v. Drayton*, 536 U.S. 194, 201 (2002), it has traditionally developed clear, *per se* rules in cases where such a rule would provide "'[a] single familiar standard,'" "'essential to guide police officers.'" *New York v. Belton*, 453 U.S. 454, 458 (1981) (quoting *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979)). In the DUI context as with other searches, "the Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances." *Schmerber*, 384 U.S. at 768. If, as in Tyler McNeely's case, there is probable cause sufficient to lawfully arrest one for driving while intoxicated – defined now as having a quantified *per se* prohibited alcohol content – then it is perforce "reasonable to believe evidence relevant to the crime of arrest" will be found in his bloodstream. *Gant*, 556 U.S. at 343 (quoting *Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring)). In fact, probable cause sufficient to lawfully arrest one for driving while intoxicated, is perforce *probable cause*

to believe evidence of the intoxicant will be found in his bloodstream. *See Ornelas v. United States*, 517 U.S. 690, 696 (1996) (Probable cause exists "where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found."). Thus, as a rule, "[i]t is the fact of the lawful arrest [for that specific offense] which establishes the authority to search" incident to an arrest for that specific evidence without "additional justification." *United States v. Robinson*, 414 U.S. 218, 235 (1973); *Gant*, 556 U.S. at 343, 347, 351.

II. To the Extent That Some Additional "Exigency" is Required to Obtain an Immediate Warrantless Nonconsensual Blood Draw From a Defendant Validly Arrested for Driving Under the Influence, the Evolution, Since this Court's Decision in *Schmerber v. California*, of Impaired Driving Laws and Enforcement Thereof Renders the Highly Evanescent Nature of Alcohol in That Defendant's Bloodstream an Even More Compelling Exigent Circumstance.

The Fourth Amendment protects "against unreasonable searches and seizures" of (among other things) the person. U.S. CONST. amend. IV. This Court "ha[s] analyzed a search or seizure in light of traditional standards of reasonableness 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to

which it is needed for the promotion of legitimate governmental interests.'" *Virginia v. Moore*, 553 U.S. 164, 171 (2008) (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)); *see also Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001). While the Fourth Amendment embodies a strong preference for warrants before certain police intrusions are made, the Court has long-recognized that in some circumstances "'the exigencies of the situation' make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable." *Mincey v. Arizona*, 437 U.S. 385, 394 (1978); *see also Michigan v. Fisher*, 130 S. Ct. 546, 548 (2009); *Brigham City v. Stuart*, 547 U.S. 398, 400 (2006). And it is well-established that police may conduct warrantless searches under the exigent circumstances exception to prevent the destruction of evidence. *Brigham City*, 547 U.S. at 403; *Minnesota v. Olson*, 495 U.S. 91, 100 (1990); *Coolidge v. New Hampshire*, 403 U.S. 443, 477-78 (1971); *Ker v. California*, 374 U.S. 23, 40 (1963) (plurality opinion).

Indeed, the destruction-of-evidence exception to the warrant requirement has been recognized at least as far back as *Johnson v. United States*, 333 U.S. 10 (1948), and *McDonald v. United States*, 335 U.S. 451 (1948), where the Court affirmed the suppression of evidence obtained from warrantless residential searches because, among other reasons, "[n]o evidence or contraband was threatened with removal or destruction" immediately preceding the search. *Johnson*, 333 U.S. at 15; *McDonald*, 335 U.S. at 455

(noting that officers had ample time to procure a warrant and that the evidence was not "in the process of destruction"). Confirming that ongoing or imminent destruction of evidence can justify a warrantless search, a plurality of the Court in *Ker v. California*, 374 U.S. at 40-41, affirmed a warrantless search based in part on officers' fears that evidence was about to be destroyed.

In sum, over the years the destruction-of-evidence exception has become axiomatic. *See, e.g.*, *Brigham City*, 547 U.S. at 403 (a warrantless search is justified by "imminent destruction of evidence"); *Georgia v. Randolph*, 547 U.S. 103, 117 n.6 (2006) ("[A] fairly perceived need to act on the spot to preserve evidence may justify entry and search under the exigent circumstances exception to the warrant requirement."); *Michigan v. Tyler*, 436 U.S. 499, 509 (1978) (same); *United States v. Watson*, 423 U.S. 411, 435 (1976) ("When law enforcement officers have probable cause to believe that an offense is taking place in their presence and that the suspect is at that moment in possession of the evidence, exigent circumstances exist. Delay could cause . . . the destruction of the evidence."); *see also State v. Entrekin*, 47 P.3d 336, 347 (Haw. 2002) ("This Court recognizes exceptions to the warrant requirement in 'those cases where the societal costs of obtaining a warrant, such as . . . the risk of loss or destruction of evidence, outweigh the reasons for prior recourse to a neutral magistrate.'"). Invocation of the destruction-of-evidence exigent-circumstance exception to the warrant requirement is generally supported by a

showing of the "*imminent* destruction of evidence." *Minnesota v. Olson*, 495 U.S. 91, 100 (1990) (emphasis added); *see also Brigham City*, 547 U.S. at 403 (noting "prevent[ion of] the imminent destruction of evidence" justifies warrantless police intrusions).

The imminent destruction of blood-alcohol evidence by the normal metabolization of that alcohol provides an inherent exigency which justifies a warrantless seizure. This Court recognized in *Schmerber* that the level of alcohol in the bloodstream of an impaired driver is "a highly effective means of determining the degree to which a person is under the influence of alcohol." 384 U.S. 757, 771 (1966); *see also Winston v. Lee*, 470 U.S. 753, 763 (1985) ("[R]esults of the blood test were of vital importance if the State were to enforce its drunken driving laws."); Michael A. Correll, *Is There a Doctor in the (Station) House?: Reassessing the Constitutionality of Compelled DWI Blood Draws Forty-Five Years After* Schmerber, 113 W. VA. L. REV. 381, 388 (2011) ("Blood tests are also often regarded as the gold standard of [driving while intoxicated] evidence."). But blood-alcohol evidence is no longer just evidence probative of whether one is potentially impaired. Instead, under the illegal *per se* alcohol-content driving laws now existing in all 50 states, the District of Columbia, Guam, and Puerto Rico it is a criminal offense to operate a motor vehicle at or above a specified alcohol concentration in the blood. NHTSA, *supra* page 13, at iii; *see also* Section I.B., *supra*. Consequently, the evidence-destruction exigent circumstance under the current construct of the nation's impaired driving

laws is even more compelling than was present at the time of *Schmerber*, because today the actual numerical value quantifying one's alcohol content is ***the*** element of the *per se* crime and disappears with each moment that passes before sample collection.

"[B]lood tests suffer from a single debilitating problem – time." Correll, 113 W. VA. L. REV. at 389. As this Court has recognized, "the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system." *Schmerber,* 384 U.S. at 770. And because alcohol is eliminated from the bloodstream persistently until it is gone, "blood and breath samples taken to measure whether these substances were in the bloodstream when a triggering event occurred must be obtained as soon as possible." *Skinner v. Ry. Labor Exec. Ass'n,* 489 U.S. 602, 623 (1989); Correll, 113 W. VA. L. REV. at 389 ("[B]lood testing demands quick extraction to achieve an accurate result. . . .").

This Court has previously affirmed the warrantless seizure of a biological sample (nail scrapings), recognizing that once an individual is placed under formal arrest, he has an increased motive "to take conspicuous, immediate steps to destroy incriminating evidence." *Cupp v. Murphy*, 412 U.S. 291, 296 (1973). Investigation of impaired driving involves a far more immediate destruction-of-evidence circumstance. Destruction of the alcohol-concentration level is not a mere potentiality; it is an actuality. *Schmerber*, 384 U.S. at 770-71 (discussing the absorption and elimination of alcohol in the blood

stream as an exigency); Correll, 113 W. VA. L. REV. at 389-90 (2011) (same). In this distinct category of cases, the delay necessary to procure a warrant will undoubtedly result in the destruction of this distinct form of valuable evidence required for prosecution of *per se* alcohol-content offenses.[7] Surely the necessity of avoiding this destruction of critical evidence far outweighs the "slight . . . intrusion as is involved in applying a blood test." *Breithaupt v. Abram*, 352 U.S. 432, 433-39 (1957); *Schmerber*, 384 U.S. at 771 ("Such tests are commonplace . . . the quantity of blood extracted is minimal and . . . the procedure involves no risk, trauma, or pain." footnote omitted)).

State police officers conducting impaired-driving investigations – often in the middle of the night or wee hours of the morning – operate under circumstances in which "the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and [thus] the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years

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[7] For example, a blood sample secured from an individual shortly after the investigating officer determines the existence of probable cause may yield a BAC of .08 – the national *per se* threshold. Taken a mere two hours later, blood taken from this same individual will yield a BAC well below this threshold (.04 to .05). Clearly, the States' drunk driving statutes are aimed at curbing the very dangerous act of impaired driving – the best indicator of an individual's impairment is evidence secured as close in time as possible to the act of driving.

after an arrest or search is made." *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001). Such circumstances call for "providing clear and unequivocal guidelines to the law enforcement profession." *California v. Acevedo*, 500 U.S. 565, 577 (1991) (internal quotation marks and citation omitted).

That principle is fully applicable here. In the investigation of today's drunk-driving laws "exigency based solely on the fact that alcohol rapidly dissipates in the bloodstream," *State v. Bohling*, 494 N.W.2d 399, 402 (Wis. 1993), is a reasonable bright-line rule defining when officers are authorized to immediately obtain a blood sample incident to arrest for that crime. *See State v. Netland*, 762 N.W.2d 202, 214 (Minn. 2009) ("[U]nder the exigency exception, no warrant is necessary to secure a blood-alcohol test where there is probable cause to suspect a crime in which chemical impairment is an element of the offense."). It is exactly this type of "readily administrable rule[ ]" that the Court has repeatedly endorsed in the Fourth Amendment context. *Virginia v. Moore*, 553 U.S. 164, 175 (2008) (quoting *Atwater*, 532 U.S. at 347). By contrast, relying on the demonstration of exigency posited by the Missouri Supreme Court and respondent – *i.e.*, requiring proof that an officer could not have obtained a warrant to draw a drunk-driving arrestee's blood without inevitably sacrificing evidence of that arrestee's blood alcohol content, *see* Pet. App. 3a, 8a, Brf. in Opp. at 26 – would seemingly require police, each time they must obtain a blood sample, to conduct a calculation of myriad factors, many of which are outside the

officer's control, including *inter alia*: the arrestee's extant BAC, the time it may take to conduct other investigative tasks, the ready availability of judicial and/or prosecutor resources, and the timely availability of a technician qualified to draw the blood. The officer would then be forced to attempt to quantify the potential success rate for obtaining a timely warrant and blood draw in an effort to determine whether the resulting guesstimate is adequate to forego a warrant. The Fourth Amendment mandates no such thing.

CONCLUSION

For the foregoing reasons, the judgment of the Missouri Supreme Court should be reversed.

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AMICUS CURIAE BRIEF

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v.

TYLER G. MCNEELY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors who regularly teach and write about criminal law and criminal procedure.[2] *Amici* have no stake in the outcome of this case other than their academic interest in the logical and rational development of the law. Because this case implicates fundamental issues of criminal procedure, *amici* believe that their perspective may assist the Court in resolving this case.

SUMMARY OF ARGUMENT

The State of Missouri asks this Court to authorize its police officers to order warrantless blood draws on every person arrested on suspicion of driving under the influence, regardless of whether exigent circumstances would justify the warrantless search. This radical retrenchment of the fundamental warrant requirement is neither supported by this Court's precedent nor justified by reason, and this Court should reject it.

The warrant requirement is the bulwark of the Fourth Amendment's protection against unconstrained governmental intrusions into a citizen's private sphere. Interposing neutral, detached magistrates between police officers and their suspects guards against improper searches, assures the subjects of any search of its legality and permissible scope,

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[1] The parties have consented to the filing of this brief, and letters expressing their blanket consent to the filing of *amicus* briefs have been filed with the Clerk. Pursuant to this Court's Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] A full list of *amici*, including their institutional affiliations, is set forth in the Appendix to this brief.

and reduces the perception of police lawlessness. Warrants are so central to the Fourth Amendment's safeguards that warrantless searches are presumed unreasonable.

Nonetheless, a warrantless search may be reasonable when a compelling government interest overrides a suspect's privacy rights. In only a very few situations – such as conducting a limited search incident to arrest – is a compelling government interest so likely to override the citizen's privacy rights that a warrantless search is inevitably reasonable. Those rare situations are governed by *per se* rules. In addition to those few *per se* exceptions, this Court has identified several exigencies that *may* justify a warrantless search, such as the need to protect the police or public from an immediate threat of harm or prevent the imminent destruction of evidence in a suspect's control. Unlike the application of a *per se* exception to the warrant requirement, an exigent-circumstances justification for a warrantless search must be supported by evidence that the totality of the circumstances supports the claim of exigency.

This Court did not carve out a *per se* exception authorizing warrantless blood draws incident to all drunk driving arrests in *Schmerber v. California*, 384 U.S. 757 (1966). Rather, the *Schmerber* Court assessed the totality of the circumstances and concluded that a true exigency rendered the warrantless blood draw reasonable in that case. Nor should this Court create a *per se* rule in this case. The gradual dissipation of alcohol in a suspect's blood does not present the type of urgency or immediacy necessary to justify such an expansive exception to the foundational warrant requirement. Moreover, given the variance in the processes and timeframe for obtain-

ing warrants in various jurisdictions, allowing warrantless blood draws following every drunk driving arrest would routinely and predictably under-protect important Fourth Amendment rights. Finally, blood draws are intrusive searches that can reveal extensive personal information far beyond evidence of blood-alcohol content. Before police officers force a citizen to submit to such an intrusive search and take possession of such information-rich evidence, the Fourth Amendment demands that they obtain a warrant, absent truly exigent circumstances.

ARGUMENT

I. THE WARRANT REQUIREMENT IS FOUNDATIONAL TO THE FOURTH AMENDMENT'S PROTECTION AGAINST UNCONSTRAINED GOVERNMENTAL INTRUSION INTO PRIVATE SPHERES

A. The Warrant Requirement Has Long Been A Feature Of Governmental Intrusions On Personal Liberty

"The decisions of this Court have time and again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy." *Jones v. United States*, 357 U.S. 493, 498 (1958). The warrant requirement is the bulwark of that protection. As Justice Harlan wrote for the Court more than half a century ago, "[w]ere [law enforcement] officers free to search without a warrant merely upon probable cause . . . the provisions of the Fourth Amendment would become empty phrases, and the protection it affords largely nullified." *Id.*

The hallmark of the warrant requirement is so entrenched in our constitutional law that warrantless searches when a person has a reasonable expectation

of privacy are presumptively unreasonable. *See, e.g.*, *Kentucky v. King*, 131 S. Ct. 1849, 1856 (2011) ("It is basic principle of Fourth Amendment law, we have often said, that searches and seizures inside a home without a warrant are presumptively unreasonable.") (internal quotations omitted); *Payton v. New York*, 445 U.S. 573, 585 (1980) ("Unreasonable searches or seizures conducted without any warrant at all are condemned by the plain language of the first clause of the Amendment."); *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967) ("[E]xcept in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant."). Moreover, for a search warrant to be valid, such that it renders a search reasonable, the warrant must particularly describe the person, place, and things to be searched. *See Groh v. Ramirez*, 540 U.S. 551, 559 (2004) ("We have clearly stated that the presumptive rule against warrantless searches applies with equal force to searches whose only defect is a lack of particularity in the warrant."). The particularized warrant requirement "ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Maryland v. Garrison*, 480 U.S. 79, 84 (1987).

B. The Warrant Requirement Serves Important Interests

The requirement that a police officer secure a particularized warrant before undertaking a search, even when probable cause is present, serves many important purposes. Warrants provide the protection of "a neutral and detached magistrate," *Johnson v.*

United States, 333 U.S. 10, 14 (1948), when a law enforcement officer is likely to be hurried, excited, or intent on safeguarding the arrest rather than the constitutional liberties of the suspect. *See also United States v. Lefkowitz*, 285 U.S. 452, 464 (1932) (noting the benefit of "the informed and deliberate determinations of magistrates"). "[T]he detached scrutiny of a neutral magistrate . . . is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer." *United States v. Chadwick*, 433 U.S. 1, 9 (1977), *abrogated on other grounds by California v. Acevedo*, 500 U.S. 565 (1991). In addition, a valid warrant will "assure[] the individual being searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *Id.* (citing *Camara*, 387 U.S. at 532). Similarly, "possession of a warrant by officers conducting an arrest or search greatly reduces the perception of unlawful or intrusive police conduct." *Illinois v. Gates*, 462 U.S. 213, 236 (1983).

As this Court made clear in *Coolidge v. New Hampshire*, 403 U.S. 443, 449 (1971), the "classic statement of the policy underlying the warrant requirement of the Fourth Amendment is that of Mr. Justice Jackson, writing for the Court in *Johnson v. United States*":

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive

> enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.

Johnson, 333 U.S. at 13-14 (footnotes omitted).

II. BECAUSE OF ITS FOUNDATIONAL IMPORTANCE, EXCEPTIONS TO THE WARRANT REQUIREMENT ARE, AND SHOULD BE, EXTREMELY LIMITED

The Fourth Amendment prohibits warrantless searches and seizures, "'subject only to a few specifically established and well-delineated exceptions.'" *Mincey v. Arizona*, 437 U.S. 385, 390 (1978) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). *Per se* exceptions to the warrant requirement are especially rare, and none of the justifications for such exceptions supports a *per se* rule that would allow warrantless blood searches of people arrested on suspicion of driving under the influence. Rather, the broadly applicable warrant requirement controls when a police officer seeks blood evidence from a suspected impaired driver. A claim that a warrantless blood draw was rendered reasonable due to exigent circumstances should be evaluated under a totality-of-the-circumstances test.

A. This Court Has Recognized Very Few *Per Se* Exceptions To The Warrant Requirement

In a very limited set of circumstances, this Court has recognized that some warrantless searches are inevitably reasonable, and thereby has created only a handful of *per se* exceptions to the warrant requirement. *See Jones*, 357 U.S. at 499 ("[t]he exceptions to the rule that a search must rest upon a search warrant have been jealously and carefully drawn"). Those exceptional circumstances fall into four categories: long-standing historical practices; cases of special need for government administration; situations in which the safety of law enforcement officers or the public is in immediate jeopardy; and situations in which the mobile and public nature of the automobile render an immediate, warrantless search both more important and less intrusive than non-vehicle cases. None of those circumstances is implicated in a drunk driving arrest when the suspect has been detained and no longer presents any threat to the officer or the public.

Certain exceptions to the warrant requirement are justified primarily because they are rooted in practices recognized at the time the Fourth Amendment was adopted. For example, this Court has upheld searches at the Nation's international borders because, "[s]ince the founding of our Republic, Congress has granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country." *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985). This Court similarly upheld the warrantless search

of mail at borders, *United States v. Ramsey*, 431 U.S. 606, 616 (1977),[3] as well as the warrantless and suspicionless search of a vessel, *United States v. Villamonte-Marquez*, 462 U.S. 579, 590-93 (1983), as "reasonable" based on the historical foundations of such practices.

This Court also has recognized *per se* exceptions to the warrant requirement in "special needs cases" – cases in which the government's need to perform a search fall outside normal law enforcement purposes, making the warrant and probable cause requirements impracticable. *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (citations omitted). The *Griffin* Court, for example, permitted a probation officer to search a probationer's home pursuant to reasonable state regulations addressing the "special needs" of the probation system. *See also, e.g., Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989) (employers in highly regulated railroad industry may require their employees after an accident to submit to warrantless blood and urine tests pursuant to federal regulations).

Other well-established *per se* exceptions protect law enforcement officers and the public from threats of imminent harm. For example, this Court has found that warrantless searches "incident to arrest" are *per se* reasonable because, "[o]therwise, the officer's safety might well be endangered, and the arrest itself frustrated." *Chimel v. California*, 395 U.S. 752, 762-63 (1969). Thus, an officer may conduct a limited search for weapons on an arrestee's person or within lunging distance of the arrestee.

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[3] The search was made at the General Post Office in New York City, which "is the 'border' for purposes of border searches." *Ramsey*, 431 U.S. at 609 n.2.

See id. Importantly, that exception is limited by the concerns that justify it: "Under *Chimel*, police may search . . . only the space within an arrestee's '"immediate control,"' meaning 'the area from within which he might gain possession of a weapon or destructible evidence.'" *Arizona v. Gant*, 556 U.S. 332, 335 (2009) (quoting *Chimel*, 395 U.S. at 763). This Court has also held that the Fourth Amendment does not require an officer to obtain a warrant to order drivers and passengers to leave a vehicle to provide for the safety of the officers involved in the stop. *See Pennsylvania v. Mimms*, 434 U.S. 106, 110-11 (1977) (per curiam); *Maryland v. Wilson*, 519 U.S. 408, 413-14 (1997). Finally, an officer may conduct an inventory search of the contents of an automobile at least in part to guard "police from potential danger." *South Dakota v. Opperman*, 428 U.S. 364, 369 (1976). In all of those cases, even though the warrantless searches infringe on the privacy rights of the target, this Court has held that warrantless searches will always be reasonable in light of the state's overriding interest in protecting police officers and the public.

Finally, this Court has carved out limited *per se* exceptions for searches of vehicles, with such exceptions justified by two factors: vehicles are readily moveable and therefore opportunities to search them may be fleeting, and the design, purpose, and pervasive regulation of vehicles result in diminished expectations of privacy in their contents. *See California v. Carney*, 471 U.S. 386, 390-92 (1985). Neither factor would justify subjecting a driver who has been removed from the vehicle and immobilized by an arrest to a warrantless search of her body – a place where she most decidedly does *not* have a diminished expectation of privacy. *Cf. United States v. Di Re*, 332 U.S.

581, 587 (1948) ("We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled."); *see also Wyoming v. Houghton*, 526 U.S. 295, 308 (1999) (Breyer, J., concurring) ("Equally obviously, the rule [that an officer may search containers within a vehicle] applies only to containers found within automobiles. And it does not extend to the search of a person found in that automobile.").

B. Exigent Circumstances That May Justify A Warrantless Search Require A True Emergency And Must Be Established On The Basis Of A Totality Of The Circumstances

In addition to a very few *per se* exceptions to the warrant requirement, "[t]his Court has identified several exigencies that *may* justify a warrantless search." *Kentucky v. King*, 131 S. Ct. at 1856 (emphasis added). Those cases make clear that exigent circumstances require some sort of emergency, maybe even a "grave emergency." *E.g.*, *McDonald v. United States*, 335 U.S. 451, 455 (1948) ("Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This . . . was done so that an objective mind might weigh the need to invade [the citizen's] privacy in order to enforce the law"); *see also Payton*, 445 U.S. at 583 (making clear that the Court had "no occasion [in this case] to consider the sort of emergency or dangerous situation, described in our cases as 'exigent circumstances,' that would justify a warrantless entry into a home for the purpose of either arrest or search"). Indeed, the word "exigent" connotes urgency and is defined as "requiring immediate action or aid; urgent; pressing." *Webster's*

Encyclopedic Unabridged Dictionary of the English Language 499 (1989). Thus, the Court has upheld claims of exigency when law enforcement officers have demonstrated a compelling need to enter a home without a warrant to provide emergency aid, *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006); to continue the hot pursuit of a fleeing suspect, *United States v. Santana*, 427 U.S. 38, 42-43 (1976); and to prevent the imminent destruction of evidence, *Ker v. California*, 374 U.S. 23, 40 (1963) (plurality op.).

Not all cases involving the potential loss of evidence give rise to the urgency required to justify a warrantless search due to exigent circumstances. Rather, the Court has upheld warrantless searches to protect evidence in circumstances in which the suspect retains control of evidence and could destroy it virtually instantaneously. Thus, in *Cupp v. Murphy*, 412 U.S. 291 (1973), the Court upheld a warrantless search of the debris under a suspect's fingernails when the police had reason to believe that the suspect was trying to rub and scrape the evidence away. *Id.* at 296. Similarly, in *Ker v. California*, the Court upheld a warrantless entry and search of an apartment when the police had reason to believe that the suspect had narcotics and might destroy them. 374 U.S at 42 ("The officers had reason to act quickly because of Ker's furtive conduct and the likelihood that the marijuana would be distributed or hidden before a warrant could be obtained at that time of night."). And this Court has recently affirmed the exception to the warrant requirement when the warrantless entry is necessary "'to prevent the imminent destruction of evidence,'" *Kentucky v. King*, 131 S. Ct. at 1856 (quoting *Brigham City*, 547 U.S. at 403) (remanding to the Kentucky Supreme Court for a

determination of whether a true exigency existed to justify the warrantless entry).

In contrast, when the potential evidence is not within a suspect's control, or for other reasons is not subject to *imminent* destruction, or when the warrantless search is overly intrusive, this Court has held that law enforcement interests do not outweigh the privacy interests protected by the warrant requirement. Thus, in *Johnson v. United States*, the Court rejected the government's claim that dissipation of opium fumes constituted an exigent circumstance permitting the warrantless search of the suspect's home. As the Court explained, "[n]o reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate. These are never very convincing reasons and, in these circumstances, certainly are not enough to by-pass the constitutional requirement. No suspect was fleeing or likely to take flight. The search was of permanent premises, not of a movable vehicle. No evidence or contraband was threatened with removal or destruction, except perhaps the fumes which we suppose in time would disappear." 333 U.S. at 15. The Court later relied on that reasoning in rejecting the warrantless search of a house after the police noticed a strong odor of "whiskey mash." *Chapman v. United States*, 365 U.S. 610, 611-12 (1961). Most importantly, this Court has rejected the argument that the possible dissipation of alcohol in a suspect's bloodstream justifies a warrantless entry into the home to effectuate an arrest. *See Welsh v. Wisconsin*, 466 U.S. 740, 754 (1984) ("[A] warrantless home arrest cannot be upheld simply because

evidence of the petitioner's blood-alcohol level might have dissipated while the police obtained a warrant.").

Moreover, the exigent-circumstance exception will justify a warrantless search only if law enforcement officers can demonstrate an actual exigency on the particular facts of the case. *See Kentucky v. King*, 131 S. Ct. at 1862 ("Any warrantless entry based on exigent circumstances must, of course, be supported by a genuine exigency."). Unlike the application of a *per se* exception to the warrant requirement, defenses of warrantless searches based on exigent circumstances are evaluated in light of careful consideration of the totality of the circumstances concerning the compelling nature of the threat and the intrusiveness of the search. *Cf. Winston v. Lee*, 470 U.S. 753, 760 (1985) ("The reasonableness of surgical intrusions beneath the skin depends on a case-by-case approach .... [T]he question whether the community's need for evidence outweighs the substantial privacy interests at stake is a delicate one admitting of few categorical answers.").

III. THERE IS NO JUSTIFICATION FOR A *PER SE* EXCEPTION TO THE WARRANT REQUIREMENT FOR BLOOD DRAWS MADE AFTER AN ARREST FOR DRIVING WHILE IMPAIRED

In *Schmerber v. California*, 384 U.S. 757, 766-72 (1966), this Court upheld a warrantless blood draw following an arrest for suspected drunk driving based on an assessment of the totality of the circumstances. *See Winston*, 470 U.S. at 760 ("[T]he *[Schmerber]* Court recognized that Fourth Amendment analysis thus required a discerning inquiry into the facts and circumstances to determine whether the intrusion was justifiable."). Even if *Schmerber* could be read

as creating a *per se* exception for warrantless blood draws, that exception would not govern this case. And there is no reason for this Court to expand the *Schmerber* holding to create a *per se* exception to the warrant requirement that would permit warrantless blood draws of every person suspected of driving under the influence.

A. *Schmerber* Applied A Totality-Of-The-Circumstances Test When It Upheld The Warrantless Blood Draw At Issue In That Case

The Court in *Schmerber* applied a totality-of-the-circumstances standard to determine whether exigent circumstances justified the warrantless blood draw. As the Court explained:

> We thus conclude that *the present record* shows no violation of petitioner's right under the Fourth and Fourteenth Amendments to be free of unreasonable searches and seizures. *It bears repeating, however, that we reach this judgment only on the facts of the present record.* The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions *under other conditions*.

384 U.S. at 772 (emphases added).

Under the "special facts" of *Schmerber*, *id.* at 771, it is hardly surprising that the Court upheld the warrantless search, given its understanding that that case raised precisely the sort of urgent, emergency concerns that generally justify warrantless searches. In particular, the Court concluded that the

officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened "'the destruction of evidence.'" *Id.* at 770 (quoting *Preston v. United States*, 376 U.S. 364, 367 (1964)). The Court made clear that the "special facts" included not only the natural dissipation of alcohol, but also that "time had to be taken to bring the accused to a hospital and to investigate the scene of the accident," meaning that "there was no time to seek out a magistrate and secure a warrant." *Id.* at 770-71. The Court also considered the fact that, as far as bodily intrusions go, drawing blood is relatively modestly intrusive and that this blood draw was performed by a physician in a hospital. *Id.* at 771.

This reading of *Schmerber* as applying a straightforward totality-of-the-circumstances exigent-circumstances test is confirmed by the Court's careful explication of that case two decades later in *Winston v. Lee*. In *Winston*, the Court evaluated a Fourth Amendment challenge to the surgical removal of a bullet. The Court explained that "[t]he reasonableness of surgical intrusions beneath the skin depends on a case-by-case approach, in which the individual's interests in privacy and security are weighed against society's interests in conducting the procedure. In a given case, the question whether the community's need for evidence outweighs the substantial privacy interests at stake is a delicate one admitting of few categorical answers. We believe that *Schmerber*, however, provides the appropriate framework of analysis for such cases." 470 U.S. at 760. The Court, "[a]pplying the *Schmerber* balancing test," *id.* at 763, then discussed and evaluated the numerous factors

that were relevant to the *Schmerber* holding. *See id.* at 761 ("Beyond these [ordinary requirements of the Fourth Amendment], *Schmerber*'s inquiry considered a number of other factors in determining the 'reasonableness' of the blood test."). The *Winston* Court ultimately concluded that the surgery would be unreasonable. In neither *Schmerber* nor *Winston* did the Court discuss, much less adopt, a *per se* exception to the broadly applicable warrant requirement.

B. Even If *Schmerber* Had Created A *Per Se* Exception To The Warrant Requirement, That Exception Would Not Justify The Search In This Case

If *Schmerber* could be understood to have created a *per se* exception to the warrant requirement, that exception would justify warrantless blood draws only when unavoidable delays extraneous to the warrant process created an urgent situation in which evidence in the blood was threatened with imminent destruction.

That unavoidable-delay formulation of any perceived *per se* exception flows from the language of the *Schmerber* opinion. *See* 384 U.S. at 770-71. As noted above, the *Schmerber* Court was concerned with the additional delay caused by the traffic accident and the need to attend to the safety of the suspect and others before the police officer could turn his attention to collecting evidence. In light of that unavoidable delay, the Court viewed *Schmerber* as an emergency case involving the potentially imminent destruction of evidence. *See id.* at 770. The Court made very clear that it was not addressing the run-of-the-mill arrest on suspicion of drunk driving. *See id.* at 772 ("It bears repeating . . . that we reach this judgment only on the facts of the present record.").

In this case, unlike *Schmerber*, there was no unavoidable delay that would justify turning a routine arrest into an exigent circumstance. This case involves neither an accident nor an injury. Rather, the officer stopped McNeely in a "routine traffic stop." Pet. App. 4a. Moreover, alcohol's slow dissipation in the bloodstream is completely out of the suspect's control. Thus, there was no urgency comparable to that justifying warrantless searches when the police are concerned with the "imminent destruction of evidence." In this case, no emergency existed that would justify an exception to the broadly applicable rule that warrantless searches are unreasonable.

C. This Court Should Not Create A *Per Se* Exception To The Warrant Requirement For All Drunk Driving Arrests

In *Richards v. Wisconsin*, 520 U.S. 385 (1997), this Court declined to create a blanket *per se* exception to the knock-and-announce requirement when police are executing a search warrant at a person's residence in a felony drug investigation. Two years earlier the Court had held that the Fourth Amendment requires police officers entering a dwelling to knock on the door and announce their identity and purpose before attempting forcible entry. *See Wilson v. Arkansas*, 514 U.S. 927, 931-36 (1995). At the same time, the Court recognized that compelling law enforcement concerns, such as "circumstances presenting a threat of physical violence" or when "police officers have reason to believe that evidence would likely be destroyed if advance notice were given," may justify an unannounced entry in some circumstances. *Id.* at 936. In *Richards*, the Court addressed the question whether the "indisputable" fact that felony drug investigations frequently involve

both of those circumstances "justifies dispensing with case-by-case evaluation of the manner in which a search was executed." 520 U.S. at 391-92. A unanimous Court held that it did not. This Court should similarly decline the invitation to craft a *per se* rule in these circumstances.

A *per se* exception to the warrant requirement for blood draws incident to arrest on suspicion of driving while impaired would permit too many intrusive searches in circumstances in which there was no real urgency to retrieve the blood. A warrantless blood draw to determine a driver's blood-alcohol content is not justified by any of the rationales that underlie existing *per se* rules. First, there is no long-standing historical exception to the warrant requirement for the coercive withdrawal of bodily fluids. Second, when a suspected drunk driver has been stopped and detained, there is no concern for officer or public safety that a warrantless blood draw could mitigate. Third, dissipation of alcohol in the bloodstream is a gradual process completely outside the control of the suspect, so there is no inherent threat of imminent destruction of evidence. And, finally, blood draws involve invasions of bodily integrity, which implicate significant, not diminished, expectations of privacy.

Arguments in support of a *per se* exception for blood draws in drunk driving arrests are unpersuasive. The principal assertion is that the gradual dissipation of alcohol combined with the relatively minimal intrusion of a blood draw and the importance of prosecuting drunk drivers always justifies a warrantless blood draw. That argument fails for the same reasons that the reach for a *per se* exception to the knock-and-announce rule failed – it overstates the need for the exception and understates the costs.

First, the gradual, natural dissipation of blood-alcohol evidence does not raise the urgent concerns about immediate destruction of evidence that is required to justify a *per se* exception to the warrant requirement. *Cf. McDonald*, 335 U.S. at 454 ("Where . . . officers are not responding to an emergency, there must be compelling reasons to justify the absence of a search warrant. A search without a warrant demands exceptional circumstances."). Blood-alcohol content ("BAC") measures the concentration of alcohol in the blood. *See* Samir Zakhari, *Overview: How is Alcohol Metabolized by the Body?*, 29 ALCOHOL RES. & HEALTH 245 (2006). After BAC reaches its highest peak, it declines as alcohol is distributed throughout the body and eliminated through the enzymatic processes of the liver. *See* Charles E. Becker, *The Clinical Pharmacology of Alcohol*, 113 CAL. MED. 37, 39-40 (1970). While elimination rates vary for each individual (based on factors such as diet, age, and drinking habits), the average rate of elimination is around 0.018% per hour (18 milligrams per 100 ml of blood per hour) and the dissipation rate is completely out of the suspect's control. *See* Douglas Posey & Ashraf Mozayani, *The Estimation of Blood Alcohol Concentration*, 3 FORENSIC SCI., MED. & PATHOLOGY 33 (2007). As petitioner acknowledges, even for heavy drinkers the elimination rate may increase to only 0.022% per hour. Pet. Br. 21. In most circumstances, the gradual dissipation provides ample opportunity for the police officer to honor the warrant requirement.

Second, the wide divergence in the processes for seeking search warrants and the disparate timeframes those processes generate counsels against adopting a *per se* rule. *See* U.S. Br. 25 ("[T]he time to

obtain a warrant can vary greatly within and among jurisdictions."); National District Attorneys' Ass'n Br. 28 ("[T]he procedures and requirements for securing a search warrant vary widely by state and even by jurisdiction within a state."). The arguments in support of a *per se* rule turn these differences on their head, by asserting that the inability of a police officer to *predict* how long it will take to get a warrant justifies the warrantless search. But the widespread variation in a crucial factor of the reasonableness inquiry ensures that a *per se* rule will regularly and predictably under-protect important Fourth Amendment rights. Moreover, the argument itself is fatally imprecise, because the fact that there are differences in warrant processes *across* jurisdictions does not mean that officers *within* a jurisdiction will not have a relatively accurate understanding of the average time it takes to get a warrant in their own jurisdiction.

Finally, nothing in the warrant requirement, or in *Schmerber*'s exception to that requirement in exigent circumstances, requires police officers to be prescient. Circumstances in which *per se* exceptions are appropriate involve officers making split-second decisions in dangerous and stressful context. In contrast, the risk of gradual dissipation of alcohol evidence in a drunk driving arrest does not require decisive action in dangerous circumstances. Rather, officers involved in a routine drunk driving arrest can presume that a warrant will be required for a blood search and begin the process of obtaining a warrant, and if that process is unduly delayed for reasons outside their control the officers can then determine whether a warrantless search would be reasonable in light of those circumstances. And if

the officers conclude that special facts exist – as in *Schmerber* – that demonstrate an increased exigency or protracted delay that may result in the actual destruction of the BAC evidence, the burden should be on the police to demonstrate that the warrantless search was justified.

The circumstances of this case, in fact, highlight the inappropriateness of a *per se* exception based on dissipation concerns. When McNeely's blood was drawn and tested, his BAC was reported as 0.154%. JA37, 60-61. Even assuming a very high rate of dissipation of 0.022% per hour, and even assuming that the warrant process had taken as long as two hours, the officer could have obtained a warrant and taken McNeely's blood and his BAC level still would have tested at 0.11% (well above the legal limit of 0.08%). As this example illustrates, the dissipation of BAC does not present the compelling exigent circumstance of the potential imminent and complete destruction of evidence within the suspect's control. *Cf. Kentucky v. King*, 131 S. Ct. at 1857 ("Destruction of evidence issues probably occur most frequently in drug cases because drugs may be easily destroyed by flushing them down a toilet or rinsing them down a drain.").

Finally, a blood draw is not minimally intrusive in every case. As the *Schmerber* Court recognized, because "[s]earch warrants are ordinarily required for searches of dwellings, . . . no less could be required where intrusions into the human body are concerned." 384 U.S. at 770. While this Court has made clear that the Fourth Amendment provides particular protection for a person's home, it has also recognized a heightened privacy interest in bodily integrity. Indeed, this Court's Fourth Amendment jurisprudence can be understood to construct a spec-

trum of privacy interests, with border areas, objects in plain view, and objects in vehicles at the low end of privacy expectations and dwellings at the high end.[4] Dignity interests in personal privacy and bodily integrity fall closer to the home on this spectrum than to objects in plain view. *See Schmerber*, 384 U.S. at 369-70. This Court also considers the invasiveness of the search, with *Terry*[5] stops and plain-view searches found to be generally less invasive than, for example, longer detentions. *See United States v. Sharpe*, 470 U.S. 675, 686-88 (1985). Even the *Schmerber* Court, which permitted a blood draw as not unduly intrusive in the particular circumstances before it, recognized the special intrusiveness of a search beneath the skin. 384 U.S. at 769-70. Because of the special expectation of privacy within one's own body and the relative intrusiveness of even a needle prick into a vein, this Court should interpose magistrates into the decision to draw blood for a DUI in all but exigent circumstances.

The medical risks that come with even a simple blood draw are nontrivial and further amplify the invasiveness of the search. Although the rates of injuries from blood draws are relatively low, the absolute numbers of individuals potentially affected

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[4] *Compare Carney*, 471 U.S. at 390-94 (vehicle searches); *Katz*, 389 U.S. at 361 (Harlan, J., concurring) ("Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited."); *Montoya de Hernandez*, 473 U.S. at 539-40 (border searches), *with Kyllo v. United States*, 533 U.S. 27, 31 (2001) ("With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no.").

[5] *Terry v. Ohio*, 392 U.S. 1 (1968).

are significant. One large study of simple blood draws reported that, out of 4,050 blood draws, 105 experienced some combination of shock-like sweats (diaphoresis) and near-fainting (near syncope), 24 patients fainted, and 6 experienced convulsions while they were unconscious. *See* Harold J. Galena, *Complications Occurring from Diagnostic Venipuncture*, 34 J. FAM. PRAC. 582, 583 (1992). In that same study, 416 experienced noticeable bruising, 80 suffered more substantial hematomas, and 80 experienced ongoing pain. *See id.* A rarer but potentially longer-lasting risk from a simple blood draw is nerve damage that can disable a person's arm. *See* Bruce H. Newman & Dan A. Waxman, *Blood Donation-Related Neurologic Needle Injury: Evaluation of 2 Years' Worth of Data from a Large Blood Center*, 36 TRANSFUSION 213 (1996).

Apart from the risks of direct physical injury, studies report that at least 2.2% of Americans experience a needle phobia meeting the relevant diagnostic criteria, and for whom the invasiveness of a blood draw would be far greater. *See* Brett Deacon & Jonathan Abramowitz, *Fear of Needles and Vasovagal Reactions Among Phlebotomy Patients*, 20 J. ANXIETY DISORDERS 946, 956 (2006). "Approximately 10% of individuals in medical settings report an excessive fear of needles that causes significant avoidance, distress, and/or impairment." *Id.* at 946-47.

The combined risks of medical injuries and psychological stress – even if relatively minor – renders blood draws sufficiently invasive that discretion to demand and conduct them should generally not be left in the hands of a police officer. Requiring a warrant will not reduce the risk of injury once a warrant is granted, but it will add the magistrate's neutral

judgment to the process (and protect suspects from unnecessary injury when a warrant is unjustified).

Moreover, by exposing markers of disease, paternity, genetic traits, and genetic identity to analyses, blood draws invade not only a physical space in which people have a high expectation of privacy – the body – but also an even more private informational space.[6] Blood contains markers for pregnancy and paternity, sexually transmitted diseases like HIV, various cancers, malnutrition, and an ever-growing list of genetic traits and diseases.[7] Many of those tests, such as paternity tests, either were discovered or have become more readily available since *Schmerber* was decided.[8] The information contained within one's blood is highly sensitive and clearly

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[6] This Court has granted certiorari in *Maryland v. King*, No. 12-207 (*cert. granted* Nov. 9, 2012), on the related issue whether "the Fourth Amendment allow[s] the States to collect and analyze DNA from people arrested and charged with serious crimes." Petition for a Writ of Certiorari i, *Maryland v. King*, No. 12-207 (U.S. filed Aug. 14, 2012), 2012 WL 3527847.

[7] *See* Pam Belluck, *Test Can Tell Fetal Sex at 7 Weeks, Study Says*, N.Y. TIMES, Aug. 9, 2011, *at* http://www.nytimes.com/2011/08/10/health/10birth.html?_r=0; Andrew Pollack, *Before Birth, Dad's ID*, N.Y. TIMES, June 19, 2012, *at* http://www.nytimes.com/2012/06/20/health/paternity-blood-tests-that-work-early-in-a-pregnancy.html?pagewanted=all; Avert, *HIV Test* (HIV tests), *at* http://www.avert.org/testing.htm (last visited Dec. 14, 2012); Mayo Clinic, *Cancer Blood Tests: Lab Tests Used in Cancer Diagnosis* (Mar. 5, 2011), *at* http://www.mayoclinic.com/health/cancer-diagnosis/CA00028; GeneCards, Weizmann Inst. of Science, *Genes Associated with Diseases*, *at* http://www.genecards.org/cgi-bin/listdiseasecards.pl?type=full (last visited Dec. 14, 2012).

[8] *See* New England Innocence Project, *A Brief History of DNA Testing*, *at* http://www.newenglandinnocence.org/knowledge-center/resources/dna/ (last visited Dec. 14, 2012).

within the sphere of a reasonable expectation of privacy. The expectation that police officers will generally secure a particularized warrant before taking a suspect's blood will protect the suspect from wide-ranging blood analyses that might reveal evidence not related to the drunk driving arrest. In the absence of a warrant limiting the scope of the search, the officer could request other tests and gain access to intimate personal details about a person's health, identity, or family. Also, depending in part on this Court's decision about the collection of identifying DNA evidence from arrestees in *Maryland v. King*, No. 12-207 (*cert. granted* Nov. 9, 2012), suspects' identifying information could be stored and used by police for completely unrelated crimes. Because both situations involve significant information about which people reasonably expect privacy, the intrusions are significant and should require a warrant.

This Court already recognizes the invasiveness of penetrating the skin and should also take into account the potential for even greater intrusions into that zone of reasonably expected privacy through modern analyses of blood. Warrants limit the scope of the search and analysis of the blood and place a magistrate between the suspect and the needle, with all of the related medical and psychological injuries that can come from a blood draw. This limitation of scope is even more important given the potential for resistance by defendants. A particularized warrant goes a long way toward ensuring the safety of all those involved by giving the defendant assurances of the lawfulness of the blood draw. *See supra* pp. 5-6.

In *Richards*, this Court rejected a *per se* rule eliminating the knock-and-announce requirement in circumstances in which the immediate destruction of

evidence will often be a very real possibility. In this case, by contrast, there is *no* possibility of immediate destruction of evidence. The Court should similarly reject calls for a *per se* rule eliminating the warrant requirement in routine impaired driving arrests.

IV. A TOTALITY-OF-THE-CIRCUMSTANCES TEST IS ADMINISTRABLE, AND ANY DIFFICULTIES WITH IT DO NOT JUSTIFY DISPENSING WITH THE WARRANT REQUIREMENT

Fourth Amendment standards of reasonableness "are not susceptible of Procrustean application." *Ker*, 374 U.S. at 33. Thus, there are many different situations in which police officers are required to assess the totality of the circumstances to determine whether their actions will comply with the Fourth Amendment. Officers currently evaluate the totality of the circumstances to determine whether a suspect can voluntarily give consent to a search because he is free to leave, *Ohio v. Robinette*, 519 U.S. 33, 39-40 (1996); how long they must wait to enter a residence after announcing their presence, *United States v. Banks*, 540 U.S. 31, 35-42 (2003); whether they are in "hot pursuit," *Santana*, 427 U.S. at 42-43; and whether other exigent circumstances justify a warrantless search, *e.g.*, *Brigham City*, 547 U.S. at 406. A totality-of-the-circumstances test is similarly appropriate for determining whether officers acted in an objectively reasonable manner in drawing blood following a traffic stop without a warrant.

In the case of an arrest for DWI, the circumstances relevant to determining whether exigency justifies a warrantless blood draw should be fairly easy for a police officer to assess. The officer will already have made a determination of probable cause before

arresting the suspect. Officers also will generally know how long it will take to obtain a warrant and how long it may take to complete the blood test after the warrant is obtained. Other possibly relevant facts, such as whether the suspected DWI resulted in injuries, will also be observable by the officers. Weighing these factors together is much like any other Fourth Amendment reasonableness determination that an officer may have to make.

However convenient it may be for law enforcement to be empowered to draw blood without a warrant after every legitimate DWI arrest, "the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment. Cf. *Coolidge v. New Hampshire*, [403 U.S.] at 481. The investigation of crime would always be simplified if warrants were unnecessary." *Mincey*, 437 U.S. at 393. By rejecting not only all but a handful of *per se* rules, but even the "overlay of a categorical scheme on the general reasonableness analysis," *Banks*, 540 U.S. at 42, this Court has made clear that convenience will not override the requirements of the Fourth Amendment. The result should be no different in the traffic stop situation presented by this case.

CONCLUSION

The judgment of the Missouri Supreme Court should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
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No. 11-1425

In the Supreme Court of the United States

STATE OF MISSOURI, PETITIONER,

v.

TYLER G. MCNEELY, RESPONDENT.

ON WRIT OF CERTIORARI TO THE MISSOURI SUPREME COURT

BRIEF OF MOTHERS AGAINST DRUNK DRIVING AS AMICUS CURIAE SUPPORTING PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Mothers Against Drunk Driving (MADD) was founded in May 1980. Its mission is to stop drunk driving, support the victims of the violent crime, and prevent underage drinking. In pursuit of those objectives, MADD participates actively in public and private studies, legislative initiatives, and law-enforcement programs aimed at reducing the incidence of alcohol-related highway tragedies. MADD is one of the largest victim-services organizations in the United States. In 2011, for example, MADD served more than 63,000 victims and survivors of drunk-driving incidents.

In 2006, MADD launched a new "Campaign to Eliminate Drunk Driving." One of the key aspects of this campaign is supporting law enforcement in their efforts to catch drunk drivers, keep them off the road, and discourage others from driving drunk. The strict enforcement of drunk driving laws, through arrest and prosecution, is essential to this effort.

The decision of the Missouri Supreme Court, if allowed to stand, threatens to hamper enforcement efforts against drunk drivers—and, as a result, could lead to more drunk driving and more tragic loss of life. This implicates the core mission of MADD.

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae states that no counsel for any party authored this brief in whole or in part, and that no person or entity other than MADD or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties have filed letters pursuant to Supreme Court Rule 37.3(a) reflecting consent to the filing of amicus curiae briefs.

SUMMARY OF THE ARGUMENT

Drunk driving remains one of the most pressing problems facing society today. Thousands of lives are lost every year due to drunk driving, and many more suffer serious injuries.

All of this is eminently preventable. One of the most effective methods of reducing drunk driving is the vigorous enforcement of drunk driving laws. But to obtain convictions, states need to be able to obtain timely blood alcohol content (BAC) readings of suspected drunk drivers. Any delay in obtaining a BAC reading not only risks the destruction of evidence that can never be recovered, but also opens a window that defendants can use to poke holes in a prosecution, by arguing that later BAC readings are flawed or insufficient to show impairment at the time of operation of the vehicle.

Additionally, there is no ready substitute for immediate testing. The respondent has suggested that the existence of retrograde extrapolation—a scientific technique that uses BAC data from one point in time to estimate the BAC at an earlier time—obviates any exigency regarding the collection of BAC evidence, but that argument is deeply flawed. Retrograde extrapolation is a method to interpret the evidence that is available—it does not lessen the need to obtain the best possible evidence of a crime. In this case, the best evidence is a BAC reading that is as close as possible to the point in time when the suspect was operating a vehicle, because any delay will lead to diminished evidence and reduce the likelihood of conviction.

ARGUMENT

A. Preventing Drunk Driving Is A Compelling State Interest, And Enforcement Is Key To Prevention

Drunk driving remains one of our society's greatest problems. In 2010 alone, 10,228 people died as a result of drunk driving.[2] That is one person dead every 52 minutes. In addition, in 2002, the last time the government released this data, over 513,000 people were injured in drunk driving crashes—one almost every minute.[3]

Yet these disturbing numbers only scratch the surface of the drunk driving problem in the United States. According to the Centers for Disease Control and Prevention (CDC), Americans "drank too much and got behind the wheel about 112 million times in 2010—that is almost 300,000 incidents of drinking and driving each day."[4] Of these drunk driving incidents, only approximately 1.4 million arrests are made.[5]

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[2] National Highway Traffic Safety Administration, *Fatality Analysis Reporting System (FARS) 2010*, available at <http://www.fars.nhtsa.dot.gov/Trends/TrendsAlcohol.aspx>.

[3] National Highway Traffic Safety Administration, *Impaired Driving in the United States*, available at <http://www.nhtsa.gov/people/injury/alcohol/impaired-drivingusa/us.pdf>.

[4] Centers for Disease Control and Prevention, *Press Release: CDC report shows about 112 million annual incidents of people drinking and driving* (Oct. 4 2011), available at <http://www.cdc.gov/media/releases/2011/p1004_drinking_driving.html>.

[5] Federal Bureau of Investigation, *Uniform Crime Reports: Crime in the United States 2010: Table 29*, available at <http://fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10tbl29.xls>.

Beyond this lethal physical toll, the economic cost is substantial. It is estimated that the cost of alcohol-impaired motor-vehicle crashes reaches $132 billion annually[6]—and that number does not even begin to measure the total economic impact of drunk driving, such as increased long-term health care costs and lost market output.

Indeed, this Court itself has long recognized the enormity of the drunk driving problem in the United States:

> No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it. Media reports of alcohol-related death and mutilation on the Nation's roads are legion. The anecdotal is confirmed by the statistical. 'Drunk drivers cause an annual death toll of over 25,000 and in the same time span cause nearly one million personal injuries and more than five billion dollars in property damage.' For decades, this Court has 'repeatedly lamented the tragedy.' 'The increasing slaughter on our highways . . . now reaches the astounding figures only heard of on the battlefield.'

Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 451 (1990) (citations omitted).

Fortunately, drunk driving has decreased from the 25,000 deaths per year mourned by the *Sitz* court

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[6] Mothers Against Drunk Driving, *Campaign to Eliminate Drunk Driving Fifth Anniversary Report to the Nation*, at 5 (Nov. 2011) available at <http://www.talklikemadd.org/books/statereport/>.

in 1990 to the 10,000 plus deaths that we suffer today.

One reason for this success is the enforcement of drunk driving laws. Enforcement of the laws, including both arrests and convictions, reduces the harm caused by drunk driving through several mechanisms.

First, the arrest and conviction of drunk drivers removes those drivers from the road, through imprisonment, license suspensions, or other penalties that restrict the operation of vehicles while impaired (such as ignition-interlock devices, which prevent an individual from starting his or her car without breathing into the device and recording a blood alcohol reading under the legal limit). Every drunk driver off the road is one less potential source of crashes, injuries, and deaths.

Second, the strict enforcement of drunk driving laws has a significant deterrent effect. Individuals who observe the consequences of driving drunk, including convictions and the resulting penalties, are less likely to drive drunk themselves. Indeed, a 2008 study determined that individuals were less likely to drink and drive if they perceived a higher probability of being stopped or arrested by law enforcement.[7]

And finally, the conviction of drunk drivers can reduce the possibility of that driver driving drunk in the future. The recidivism rate for drunk driving is extremely high—in one study, 17.8% of individuals convicted of a drunk driving offense were arrested

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[7] Anthony Bertelli, *The Behavioral Impact of Drinking and Driving Laws*, Policy Studies Journal 36:4, 545-569 (Nov. 19, 2008).

again for drunk driving within five years of their prior offense.[8]

One reason for this high recidivism rate is that individuals who drink and drive often have problems with alcohol generally—in one study, for example, 82% of individuals who had just been convicted of drunk driving for the first time were assessed as problem drinkers or alcoholics.[9] As a result, however, convictions for drunk driving can provide one significant benefit in preventing future instances of drunk driving: court-ordered treatment. One study found that remediation treatment for alcohol abuse can by itself reduce drunk driving recidivism by 8-9%[10], while another found that treatment combined with license suspension or revocation can reduce recidivism by as much as 50%.[11]

This is unsurprising, as a drunk driving arrest and conviction presents individuals with a clarifying

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[8] Randall L. Deyle, *First offender BACs as a predictor of DUI recidivism*, Colorado Department of Human Services, at 5 (Feb. 2010), available at <http://cospl.coalliance.org/fedora/repository/co:9524>.

[9] Matthew L. Wald, *Battle Against Drunken Driving Should Shift Focus, Some Experts Assert*, N.Y. Times (Jan. 3, 1987), available at <http://www.nytimes.com/1987/01/03/us/battle-against-drunken-driving-should-shift-focus-some-experts-assert.html>.

[10] Elisabeth Wells-Parker, et al., *Final results from a meta-analysis of remedial interventions with drink/drive offenders*, Addiction 90:7, 907-926 (July 1995).

[11] Ralph K. Jones & John H. Lacey, *State of Knowledge of Alcohol-Impaired Driving: Research on Repeat DWI Offenders*, available at <http://www.nhtsa.gov/people/injury/research/pub/Alcohol-ImpairedDriving.html>.

event that forces them to recognize their problem with drinking and acknowledge the consequences of their actions. As researchers have noted, "most first-time offenders who entered a DUI program acknowledged that they needed to change both their drinking and their drinking-and-driving behavior, and indicated that they were trying to do so."[12]

In sum, the severity of the drunk driving problem in this country cannot be underestimated. Allowing the decision below to stand will hamper efforts to combat drunk driving by interfering with the State's ability to obtain convictions for drunk driving offenses, which is essential to the prevention of drunk driving.

B. The Timely Measurement Of Blood Alcohol Is Crucial To The Enforcement Of Drunk Driving Laws

Timely measurement of a defendant's BAC is necessary to increase the chances of obtaining a drunk driving conviction. This is because any delay at all in obtaining BAC measurements is an opening that criminal defendants use to attack an otherwise valid drunk driving prosecution—and they often succeed in doing so.

An exhaustive study of drunk driving cases in Massachusetts identified delay in measuring BAC as a problem in obtaining drunk driving convictions: "There was general agreement among the prosecutors, judges, and defense lawyers we interviewed

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[12] Patricia L. Dill & Elisabeth Wells-Parker, *Court-Mandated Treatment for Convicted Drunk Drivers*, National Institute on Alcohol Abuse and Alcoholism (2006), available at <http://pubs.niaaa.nih.gov/publications/arh291/41-48.htm>.

about the factors that can make [drunk driving] cases difficult to prove. . . . Breathalyzer test results can be attacked based on delay. . . ." [13]

As the study describes it, defense attorney "tactics often focus on the impact of delay on the evaluation of the test result, seeking to convince judges to give it little weight as evidence of the defendant's blood alcohol level at the time of operation."[14] All of that explains one of the study's most troubling findings: even breathalyzer results over the legal limit admitted at trial "sometimes do not result in convictions."[15]

Indeed, this is also why an immediate *blood test* is so valuable. While defendants have achieved some success in leveling spurious attacks on breathalyzer data—including not just allegations of delay, but also unfounded attacks on the validity of breathalyzer analysis in general[16]—blood testing has avoided any serious legal challenge, because no one dares dispute its status as the most precise measure of BAC (after all, BAC stands for *blood* alcohol content).

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[13] R.J. Cinquegrana & Diana K. Lloyd, *Report to the Supreme Judicial Court*, at 7 (Oct. 2012), available at <http://www.mass.gov/courts/sjc/docs/report-110112.pdf>.

[14] *Id.* at 36.

[15] *Id.* at 8.

[16] *See* American Prosecutors Research Institute, *Overcoming Impaired Driving Defenses*, at 18-21 (Nov. 2003), available at <http://www.ndaa.org/pdf/overcoming_impaired_driving_defenses.pdf>.

C. Retrograde Extrapolation Is Not A Valid Reason To Affirm The Judgment Below

Retrograde extrapolation is a technique by which a scientist can use a person's BAC measurement from one point in time to calculate what that person's BAC may have been at an earlier time, taking into account factors such as body weight and the time the individual consumed alcoholic beverages.

Retrograde extrapolation is used in many circumstances, but primarily as evidence of a defendant's BAC at the time of operation of a vehicle based on a later BAC measurement. The respondent has suggested that this use of retrograde extrapolation obviates any exigency in securing evidence of a person's BAC, but this is incorrect.

As noted above, pointing to delays in obtaining a BAC reading is a common defense tactic. Extensive reliance on retrograde extrapolation only exacerbates this problem, as it explicitly acknowledges the unavailability of timely BAC data, but nonetheless suggests that the best evidence is an earlier BAC measurement.

Indeed, the use of retrograde extrapolation does not *obviate* the need for a timely measurement of BAC—it *highlights* the need for a timely measurement. While the extent to which BAC rises and falls has been drastically overstated by many defense attorneys, it is true that—as with any predictive method—the greater the amount of time between the BAC measurement and the operation of the vehicle, the less accurate the results of retrograde extrapolation. And, conversely, by obtaining a BAC reading as close as possible to the time of operation, a more accurate picture can be drawn of the suspect's BAC at time of operation.

Also related to the use of retrograde extrapolation is the concept of peak alcohol concentration. Essentially, alcohol takes time to be absorbed and eliminated. After one consumes alcohol, the level of alcohol in the bloodstream rises based on several variables. At some point after consumption, the blood alcohol level "peaks," representing the time at which there is the greatest level of impairment that will result from the amount of alcohol consumed by the individual (in the eyes of the law, which uses BAC as an approximation of impairment). After this peak, the levels begin to decrease at a rate that is again affected by several variables, including time of offense, time of test, test result, gender, weight, height, age, food consumption, drinking history, number of drinks, size of drinks, concentration of alcohol in the drinks, and timing of drinks.[17]

In the context of arresting and convicting drunk drivers, this means it is possible that someone whose blood alcohol was measured at one point in time may have actually had a lower *or* higher BAC at the time of operation, just through normal metabolic processes.

This potential discrepancy between BAC at time of measurement and time of operation has led some to oddly suggest that a timely measurement of BAC is completely unnecessary, because it may not result in useful evidence. But this is non-responsive to the issue of whether a timely BAC measurement is the

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[17] *See* American Prosecutors Research Institute, *Alcohol Toxicology for Prosecutors*, at 20-24 (July 2003), available at <http://www.ndaa.org/pdf/toxicology_final.pdf>.

best available evidence, regardless of what the BAC may have been at operation.

Consider: if a BAC measurement is taken immediately after an individual is stopped for suspected drunk driving, the results of the measurement can yield three possible scenarios: (1) the BAC measurement is an accurate indication of the level of impairment at time of operation, because little to no absorption or elimination has occurred between time of operation and time of measurement; (2) the BAC measurement is understating the level of impairment, because alcohol is being eliminated and thus the BAC measurement is lower at the time of measurement than at the time of operation; or (3) the BAC measurement is overstating the level of impairment, because alcohol is still being absorbed and thus the BAC measurement is greater at the time of measurement than at the time of impairment.

All three scenarios reveal a need for a timely BAC measurement. In scenario (1), obviously a timely measurement has yielded valuable evidence. Indeed, that is the ideal scenario for all participants, because the State avoids the concerns of scenario (2) and the suspect avoids the potential for scenario (3). The possibility of this scenario alone warrants an immediate measurement of BAC, as any delay risks the destruction of textbook evidence of a crime.

But both scenarios (2) and (3) also reveal a need for a timely BAC measurement.

In scenario (2), the damage has already been done: alcohol is being eliminated from the bloodstream at a rate that is dependent on several variables. While BAC at operation may be estimable through retrograde extrapolation, the amount of alcohol in the suspect's blood will never again be

measurable for certain. Moreover, as explained above, the more time that passes between operation and measurement, the less accurate the results of retrograde extrapolation.

Similarly, in scenario (3), alcohol is already being absorbed into the bloodstream. Waiting even more time to take a measurement does not solve the problem that the measurement will be greater than it was at the time of operation (until peak is reached and BAC begins to drop again, further complicating matters).

Thus, under any scenario, there is still a critical advantage to obtaining an immediate measurement of BAC. And, of course, it is impossible to know at the time of measurement which of the three scenarios is present. For that reason, an immediate BAC measurement is the only way to ensure that evidence is properly maintained, after which its relevance and value can be ascertained.

Thus, while the absorption and measurement of blood alcohol in the bloodstream is an admittedly complicated subject, this case does not force this Court to confront any of those complications or engage in any extensive scientific inquiry. Neither retrograde extrapolation nor the existence of varying peak alcohol levels affects the need for a timely measurement of BAC, because a timely measurement remains the best possible evidence to convict drunk drivers.

CONCLUSION

The decision of the Missouri Supreme Court should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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STATE OF MISSOURI,

Petitioner,

v.

TYLER G. MCNEELY,

Respondent.

On Writ of Certiorari to the Supreme Court of Missouri

BRIEF OF THE NATIONAL COLLEGE FOR DUI DEFENSE AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

Amici curiae are the National College for DUI Defense ("NCDD") and the National Association of Criminal Defense Lawyers ("NACDL").[1]

NCDD is a nonprofit professional organization of lawyers, with over 1,000 members, focusing on issues related to the defense of persons charged with driving under the influence. Through its educational programs, its website, and its email list, the College trains lawyers to represent persons accused of drunk driving. NCDD's members have extensive experience litigating issues regarding blood alcohol tests.

NACDL, a non-profit corporation, is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's approximately 10,000 direct members in 28 countries—and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys—include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, their members, and counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *amici curiae* certify that counsel of record for both parties received timely notice of *amici curiae's* intent to file this brief and have consented to its filing in letters on file with the Clerk's office.

NACDL has frequently appeared as *amicus curiae* before the United States Supreme Court, the federal courts of appeal, and the highest courts of numerous states. In particular, in furtherance of NACDL's mission to safeguard fundamental constitutional rights, the Association frequently appears as *amicus curiae* in cases involving the Fourth Amendment and its state analogues, speaking to the importance of balancing core constitutional search and seizure protections with other constitutional and societal interests. As relates to the issues before the Court in this case, NACDL has an interest in protecting both privacy and associational rights from unwarranted and unreasonable government intrusion.

SUMMARY OF THE ARGUMENT

Although Missouri complains that, in theory, obtaining a warrant to draw blood is a burden, the fact that at least twenty-one states regularly obtain warrants and successfully prosecute thousands of drunk driver cases each year belies that claim. Such a widespread practice indicates that a significant number of states strike the balance between privacy interests and policing efficacy differently. Missouri asks this Court not to strike a different balance, but to strike no balance at all and instead to permit a new *per se* rule that ignores privacy interests on a categorical basis.

It is undisputed that obtaining a warrant, even by email or telephone, necessarily takes some time. However, the dissipation of alcohol from the bloodstream only constitutes an exigency if substantial delay in obtaining a warrant prevents collection of a blood sample within the relevant window of time. In practice, substantial delays are not inherent to the warrant process. Anecdotal

evidence demonstrates that technology has expedited and streamlined warrant procedures, such that police routinely obtain warrants in less than thirty minutes in many jurisdictions.

In the context of drunk driving, search warrants are especially important because police are under pressure to secure timely evidence of the driver's blood alcohol content. Requiring an officer to apply for and obtain a search warrant before drawing blood from a driver who has not consented ensures that a neutral and detached magistrate assesses the specific circumstances of the case, and increases the likelihood that the driver will either consent to a breath test or cooperate with the blood draw.

ARGUMENT

I. *PER SE* WARRANTLESS BLOOD DRAWS ARE UNNECESSARY

Missouri wants a new *per se* rule that ignores individual privacy interests on a categorical basis. This Court should not adopt Missouri's rule because it is unnecessary and inappropriate. *See United States* v. *Drayton*, 536 U.S. 194, 201 (2002) ("for the most part *per se* rules are inappropriate in the Fourth Amendment context"). Missouri suggests that a *per se* rule in this case "comports with Fourth Amendment standards of reasonableness," Pet. Br. at 15, 28, even though the Court has repeatedly rejected blanket rules.[2] *See Arizona* v. *Gant*, 556 U.S. 332, 343 (2009);

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[2] Missouri attempts to justify a *per se* rule by arguing that it "provides the best and most probative evidence," Pet. Br. at 15, even though the Court has held that "the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment." *Mincey* v. *Arizona*, 437 U.S. 385, 393 (1978).

Winston v. *Lee*, 470 U.S. 753, 760 (1985); *Mapp* v. *Ohio*, 367 U.S. 643, 653 (1961).

A. States Already Successfully Prosecute Thousands of Drunk Driving Cases After Police Obtain Warrants to Draw Blood

There is no need for this Court to adopt a new *per se* rule permitting warrantless searches in all drunk driving cases. To the contrary, at least twenty-one states—including Missouri—have had little difficulty enforcing their laws even when the police have obtained search warrants before withdrawing blood for alcohol testing. These states include: Alabama, Arizona, Georgia, Illinois, Iowa, Kansas, Louisiana, Michigan, Mississippi, Missouri, Montana, New Mexico, North Carolina, Ohio, Oregon, Tennessee, Texas, Utah, Vermont, Washington, and Wyoming. *See* Addendum A.

In the states where obtaining warrants to draw blood has long been the norm, prosecutors have successfully obtained thousands of convictions. For example, the National Highway Traffic Safety Administration ("NHTSA") recently examined four of these states—Arizona, Michigan, Oregon, and Utah—and reported that police have obtained 2,000 warrants a year in Arizona's largest county, which includes Phoenix. NHTSA, DOT HS 810 852, USE OF WARRANTS FOR BREATH TEST REFUSAL: CASE STUDIES, (2007), at 4, 7 ("NHTSA CASE STUDIES"). In Michigan, police reportedly obtain a warrant in almost every case where the driver refuses to submit to a breath test. *Id.* at 15. Overall, NHTSA found that judges and prosecutors strongly supported warrants for blood draws because they have increased the number of cases with blood alcohol content ("BAC") evidence, which has resulted in "more guilty pleas, fewer trials, and more convictions." *Id.* at 36.

When states streamline the application process and prosecutors and judges make themselves more available, police can easily obtain search warrants to draw blood. For example, in states that are newer to the warrant process, NHTSA has been promoting "No-Refusal Weekends" where police publicize in advance that they will be getting warrants for drunk driving suspects who refuse to submit to a breath test. The NHTSA offers jurisdictions an online "No-Refusal Weekend Toolkit" with samples of simplified warrant forms that can be used to expedite the process. *See* NHTSA, NO REFUSAL, http://www.nhtsa.gov/no-refusal (last visited Dec. 14, 2012). Through efforts like these, states can "build solid cases," which lead to more drunk driving convictions. *Id.*

Blood samples are obtained in a straightforward way. First, a police officer arrests the driver and asks for a breath sample. NHTSA CASE STUDIES, at 36. The officer informs the driver of the state's implied consent laws and penalties. *Id.* If the driver refuses to provide a breath sample, the officer requests a warrant for a blood sample by completing standardized affidavit and warrant forms. *Id.* The officer then either electronically transfers the forms to the judge, magistrate, or prosecutor (or even reads them over the phone) and the warrant is then sworn over the telephone. *Id.*; *see also* Addendum B (forms used in Phoenix, Arizona). Once the warrant is granted, the driver must submit to the blood draw.

The entire process—including completing the forms, transmitting the information, obtaining the warrant, and transporting the driver to a medical facility or using a police phlebotomist to draw the

blood—ordinarily takes no more than two hours.[3] NHTSA CASE STUDIES, at 36. Police officers interviewed by NHTSA "generally supported the use of warrants" and were "willing to take the additional time . . . in order to obtain BAC evidence." *Id.*

On the other hand, *amici* in support of Missouri cited only a handful of cases where the police took more than two hours to obtain BAC evidence.[4] In the case with the most egregious delay, the police did not draw the driver's blood until four hours after the collision. *See Smith* v. *State*, 942 So. 2d 308, 313 (Miss. Ct. App. 2008). In spite of the long delay, the court *affirmed* the conviction. *Id.* at 322. In doing so, the court expressly rejected the argument that, in order for blood draw evidence to be admissible, it must be drawn "at the time of the accident." *Id.* at 314.

Here, *amici* agree that unreasonable delay in obtaining a warrant should be *a factor* in determining whether to allow a warrantless blood draw under

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[3] Even the traditional consensual manner of obtaining BAC evidence, with a breath test, has built in delays. Police need time to read the driver an implied consent advisory, time to give the driver an opportunity to make a decision, including to consult with counsel (in the states that allow it), and police must observe a required 15 or 20 minute deprivation period where the suspect is observed and not allowed to eat, drink, belch or regurgitate before submitting to a breath test. In contrast, police in states like Michigan can easily obtain blood draw warrants so "officers will choose a blood test," depending on the circumstances, because it "will be faster." NHTSA CASE STUDIES, at 17. In Arizona, "blood test[s] can require no more police time than a breath test if blood test facilities are readily available." *Id.* at 14.

[4] *See* Brief for Nat'l Dist. Attorneys Ass'n *et al.* as *Amici Curiae* Supporting Petitioner, at 11–13 (citing *Mata* v. *State*, 46 S.W.3d 902 (Tex. Crim. App. 2001); *State* v. *Eighth Judicial Dist. Ct.*, 267 P.3d 777 (Nev. 2011); and *Smith* v. *State*, 942 So.2d 308 (Miss. Ct. App. 2006)).

Schmerber v. *California*, 384 U.S. 757 (1966).[5] But Missouri goes too far in arguing that "an inherent exigency always exists" solely because alcohol naturally dissipates in the bloodstream. Pet. Br. at 26. To the contrary, because of predictable rates of dissipation, police actually have a "window of opportunity" in which to seek a search warrant to draw blood. Resp. Br. at 45.

B. Technological Advances Allow Police to Obtain Warrants in Minutes

Advancements in communications technology have substantially expedited the process for obtaining search warrants, making it much easier to get a warrant within the relevant window of time. Using widespread electronic communications technology, police can obtain search warrants in minutes rather than hours.[6] Thus, whether the dissipation of alcohol from the blood stream qualifies as an exigent circumstance necessarily depends on how quickly an officer can obtain a warrant.

Several courts have accounted for the time it takes to obtain a warrant in determining whether an exigency existed. *See United States* v. *Cuaron*, 700 F.2d 582, 589 (10th Cir. 1983); *United States* v.

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[5] Anecdotal evidence suggests that as police are able to determine when a suspect has run out of time to consent to a breath test, they are also intimately familiar with the legal requirements of their jurisdictions and aware of the time needed to obtain a blood sample that satisfies those requirements.

[6] Many police cruisers have laptops with internet connections attached to their dashboards, allowing for virtually instantaneous transmission of information. *See* Patrick T. Sullivan, *Cape Police More Efficient With In-Car Laptops*, SOUTHEAST MISSOURIAN, Feb. 6, 2012, *available at* http://www.semissourian.com/story/1812598.html.

McEachin, 670 F.2d 1139, 1147 (D.C. Cir. 1981); *United States* v. *Baker*, 520 F. Supp. 1080, 1084 (S.D. Iowa 1981); *State* v. *Flannigan*, 978 P.2d 127, 131 (Ariz. Ct. App. 1998). The D.C. Circuit reasoned that "the courts must consider the availability of a telephonic warrant in determining whether exigent circumstances existed, unless it is clear that the exigency in a particular case was so great that it precluded recourse to any warrant procedure, however brief." *McEachin*, 670 F.2d at 1147.

In 1966, when the Court decided *Schmerber*, no state statute allowed for the issuance of warrants by telephone or other electronic means.[7] Police officers seeking warrants had to appear personally before a judge. But today, thirty-five states have passed statutes that allow police officers to electronically submit warrant applications and judges to issue search warrants by one or more of the following methods: telephone, radio, facsimile, email, video conference, or text message. *See* Addendum C (listing statutes). Only fifteen states still specify written or in person applications or make no mention of electronic submission. *See* Addendum D (listing statutes). Moreover, even within states that have not expressly provided for electronic warrant procedures, police officers in

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[7] In 1970, four years after *Schmerber*, California adopted one of the first statutes providing for oral submission of testimony in 1970. *See People* v. *Peck*, 113 Cal. Rptr. 806, 809 (Cal. Ct. App. 1974); Justin H. Smith, Note, *Press One for Warrant: Reinventing the Fourth Amendment's Search Warrant Requirement Through Electronic Procedures*, 55 VAND. L. REV. 1591, 1607–09 (2002).

some jurisdictions have nonetheless found ways to use technology creatively to expedite the process.[8]

C. States Have E-Warrant Procedures

Of the thirty-five states that provide for remote warrant procedures, at least four—California, New Mexico, Utah, and Vermont—explicitly allow police to use of email or text messaging to apply for and receive a warrant. *See* Cal. Penal Code § 1526(b); N.M. R. Crim. P. 5-211(f)(3), (g)(3); Utah R. Crim. P. 40(l); Vt. R. Crim. P. 41(c)(4), (g)(2). For example, in Utah, "[a]ll communication between the magistrate and the peace officer or prosecuting attorney requesting the warrant may be remotely transmitted by voice, image, text, or any combination of those, or by other means." Utah R. Crim. P. 40(l)(1). Utah has implemented an e-warrants system:

> The e-warrants system allows Utah law enforcement officers to enter search warrant affidavit information. The system then electronically notifies a prosecutor and forwards the affidavit for review. After review, an officer can transfer the affidavit to a magistrate, electronically notifying him or her of the waiting request. The magistrate can then electronically review the affidavit

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[8] Even though Fla. Stat. Ann. § 933.07, does not address the use of technology to obtain a warrant, Palm Bay police officers have expedited the warrant process by emailing an affidavit to the judge and then videoconferencing with the judge via Skype. PALM BAY POLICE, INNOVATIVE POLICING CREATING A SAFER COMMUNITY (2011), at 10, *available at* http://www.palmbayflorida.org/police/documents/annual_report_2011.pdf. "The process takes an average of *less than thirty minutes* in comparison to several hours it would have taken using traditional means." *Id.* (emphasis added).

> and [electronically] generated warrant, electronically sign the warrant, or deny the request with comments, then electronically send the results back to the officer.

STATE OF UTAH, E-WARRANTS: CROSS BORDER COLLABORATION (2008), at 1, *available at* http://www.nascio.org/awards/nominations/2008/2008UT2-e-Warrants%20Submission%206.2.08fs1fs.pdf. Utah's e-warrants system has reduced the amount of time it takes to obtain a warrant from several hours to several minutes. Jason Bergreen, *Utah Cops Praise Electronic Warrant System*, SALT LAKE TRIB. (Dec. 26, 2008) (explaining that it took *five minutes* to obtain an "e-warrant for a forced blood draw on a man arrested for DUI") (emphasis added).

Similarly, police officers in Douglas County, Kansas, are able to obtain search warrants in fifteen minutes by emailing a request for a warrant to a judge's iPad, which the judge may sign and return via email. Gregory T. Benefiel, *DUI Search Warrants: Prosecuting DUI Refusals*, THE KANSAS PROSECUTOR, Spring 2012, at 17–19, *available at* http://www.kcdaa.org/Resources/Documents/KSProsecutor-Spring12.pdf.

D. Telephonic Warrants Also May Be Granted in Minutes

At least twenty of the thirty-five states that allow remote warrants specifically allow the submission of testimony and issuance of warrants over the

telephone.[9] Telephonic warrants are more widespread than email or videoconferencing, and they are equally prompt. According to the Chief of Police in Cheyenne, Wyoming, obtaining a search warrant over the phone usually takes less than five minutes.[10] Lindsey Erin Kroskob, *Police Take First Forced Blood Draw*, WYOMING TRIB. EAGLE (Aug. 19, 2011); *see also* Addendum E (Wyoming affidavit for blood draw search warrant). In Billings, Montana, it takes about fifteen minutes to obtain a telephonic warrant. *Gazette Opinion: Evidence Shows Value of DUI Search Warrants*, BILLINGS GAZETTE (May 30, 2012).

When an officer has not even attempted to use the procedures in place for obtaining a warrant, as is the case here, the state should not benefit from the speculation that the officer might have encountered delay if he had made any effort. *Flannigan*, 978 P.2d at 131 ("We do not know how long the delay would have been because the police made no effort whatsoever to obtain a warrant. *The mere possibility of delay does not give rise to an exigency.*") (emphasis

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[9] These states include Alabama, Alaska, Arkansas, Arizona, California, Idaho, Indiana, Louisiana, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, South Dakota, Utah, Washington, and Wisconsin. *See* Addendum C.

[10] Because Wyoming's rules do not address remote means for obtaining a warrant, Wyoming was not included as one of the twenty states that provides for telephonic warrants, or one of the thirty-two states that allows electronic warrants generally. *See* Wyo. R. Crim. P. 41(c).

added).[11] If a jurisdiction's outmoded warrant procedures result in habitual delays, then the response should be to update the procedures, rather than dispense with the protections of the Fourth Amendment.

II. *PER SE* WARRANTLESS BLOOD DRAWS ARE UNREASONABLE AND UNCONSTITUTIONAL

Contrary to Missouri's argument, drivers do not categorically forfeit Fourth Amendment protections against unreasonable searches simply by driving on public roads. *See United States* v. *Jones*, 565 U.S. __, __, 132 S. Ct. 945, 950–51 (2012); *Coolidge* v. *New Hampshire*, 403 U.S. 443, 461 (1971). Even on public roads, warrantless searches and seizures are presumptively unreasonable in areas where citizens maintain an expectation of privacy. *See Katz* v. *United States*, 389 U.S. 347, 357 (1967). A person has a reasonable expectation of privacy in his or her body; indeed, intrusions into the human body implicate the "most personal and deep-rooted expectations of privacy." *Lee*, 470 U.S. at 760. This Court should not adopt a new *per se* rule that gives police unchecked power to intrude upon a driver's reasonable expectation of privacy in all drunk driving cases.

A. The Warrant Requirement Checks Police Power in DUI Cases

Under the Court's Fourth Amendment cases, police officers already have substantial discretion when stopping drivers to enforce traffic laws. If a police of-

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[11] The court went on to say that "if the police had attempted to obtain a warrant but had encountered difficulties in reaching a magistrate, this change in circumstances might well have created an exigency justifying the warrantless seizure of defendant's blood." *Flannigan*, 978 P.2d at 131.

ficer has an "articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered," he may stop a vehicle to check the driver's license and registration. *Delaware* v. *Prouse*, 440 U.S. 648, 663 (1979). If the "license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order," the officer may stop the vehicle. *South Dakota* v. *Opperman*, 428 U.S. 364, 368 (1976). Police officers may ask "a moderate number of questions" to confirm or dispel suspicions, *Berkemer* v. *McCarty*, 468 U.S. 420, 439 (1984), and they may direct the driver to exit the vehicle. *Pennsylvania* v. *Mimms*, 434 U.S. 106, 119 n.10 (1977). Regardless of subjective intent, if the police officer has "probable cause to believe that a traffic violation has occurred," then the officer is permitted to stop any vehicle. *Whren* v. *United States*, 517 U.S. 806, 810 (1996).

Petitioner wants to give police even more discretion by creating a categorical rule that would permit an officer, so long as he has probable cause, to draw blood without a warrant simply because "alcohol is naturally eliminated from the human body."[12] Pet. Br. at 13. Petitioner's rule is unreasonable and inap-

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[12] Petitioner's categorical rule also increases the likliehood that the police will decide to draw the blood themselves rather than take the suspect to a medical medical facility. *See Schmerber*, 384 U.S. at 771-72 (allowing non-medical personnel to conduct even "the most rudimentary" medical techniques, like drawing blood, outside of the medical environment raises "serious questions"); *see generally* Holly Hinte, *Drunk Drivers and Vampire Cops: The "Gold Standard"*, 37 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 159 (2011) (analyzing police phlebotomists and their "detrimental consequences").

propriate. *Drayton*, 536 U.S. at 201 (rejecting *per se* rules in the context of the Fourth Amendment).

B. Search Warrants Protect Officers and Drivers

Requiring a search warrant before drawing blood ensures not only that a neutral and detached magistrate assesses the specific circumstances for the request, *Johnson* v. *United States*, 333 U.S. 10, 13–14 (1948), but it may also increase the chances that the suspect will consent to take a breath test when informed of the warrant process, *see* NHSTA CASE STUDIES at 13, 17, or choose to cooperate with the blood draw.[13] Kroskob, *supra* ("'Usually, once we have the warrant they go ahead and cooperate with the blood draw,' Chief Brian Kozak said"). Additionally, search warrants protect officers from civil suits and liability. *Malley* v. *Briggs*, 475 U.S. 335, 345 (1986) (the good faith standard from *United States* v. *Leon*, 468 U.S. 897 (1984), applies to determine the qualified immunity in § 1983 actions for police officers obtaining warrants).

Rather than adopting a new categorical rule that gives police unchecked power to intrude upon a driv-

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[13] Blood draw situations are potentially dangerous for the officer and the intoxicated suspect. *See* Bruce Vielmetti, *DA Reviewing Death of West Allis Man After Taser Incident*, MILWAUKEE J. SENTINEL, Dec. 6, 2012, *available at* http://www.jsonline.com/news/crime/da-reviewing-death-of-west-allis-man-after-taser-incident-fb7udli-182445041.html (reporting how a man "resisted attempts to take a blood sample," how the police "restrained and stunned [him] with a Taser," and how he was found dead the next day). Suspects do not always cooperate with police blood draws. Undercover ABC 13, *Forced Blood Draw* (July 20, 2011) http://www.youtube.com/watch?v=ZONkSLmVUtQ (last visited Dec. 14, 2012) (showing the police forcibly drawing blood on the floor of the police station).

er's "most personal and deep-rooted expectations of privacy," *Lee*, 470 U.S. at 760, in all drunk driving cases, the Court should affirm the rule that it already has adopted. "[W]hether a warrantless blood test is unreasonable in any given case should be determined based on the totality of circumstances." Resp. Br. at 10; *see also United States* v. *Banks*, 540 U.S. 31, 36 (2003); *Ker* v. *California*, 374 U.S. 23, 33 (1963); *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 357 (1931).

Petitioner claims that the dissipation of alcohol in the body of a drunk driving suspect creates an exigency and that justifies dispensing with the warrant requirement in *every* case. However, anecdotal evidence shows exactly the opposite, that states are able to successfully prosecute cases using warrants to obtain blood alcohol tests in thousands of cases every year. Some states could even improve their already acceptable return times by using widely available electronic communications technology. Warrants help persuade suspects to consent to a breath test or cooperate with a non-consensual blood test, and provide some protection to officers from civil liability. Finally, under *Schmerber*, police may nevertheless draw blood without a warrant when reasonable efforts have failed to obtain the warrant and there are exigent circumstances particular to that situation. Thus, under the current totality of circumstances rule, police are able to obtain a blood sample that satisfies legal requirements in *every* case where they have probable cause to seek one.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Supreme Court of the State of Missouri.

Respectfully submitted,

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December 17, 2012

ADDENDUM

ADDENDUM A

States Using Warrants to Draw Blood

Alabama: *Britton v. State*, 631 So. 2d 1073 (Ala. Crim. App. 1993); A. R. Crim. P. 16.2(b)(6)

Arizona: Ariz. Rev. Stat. Ann. §§ 13-3915 (D), (E), 28-1321, 28-1388

Georgia: Ga. Code Ann. § 40-5-67.1 (d.1); Rhonda Cook, *DUI Test Refusals Prompt Blood Warrant*, ATLANTA J.-CONST. (Dec. 23, 2011), http://www.ajc.com/news/news/local/dui-test-refusals-prompt-blood-warrants/nQPnJ/ (last visited Dec. 14, 2012)

Illinois: *DuPage County Rolls Out 'No Refusal' Weekend Over Labor Day*, NAPERVILLE PATCH (Aug. 31, 2011), http://naperville.patch.com/articles/dupage-county-rolls-out-no-refusal-weekend-over-labor-day-2 (last visited Dec. 14, 2012)

Iowa: Iowa Code §§ 321J.10, 321J.10A(1)(c); *State v. Harris*, 763 N.W.2d 269 (Iowa 2009); *State v. Johnson*, 744 N.W.2d 340 (Iowa 2008)

Kansas: Kan. Stat. Ann. § 8-1001 (p), (t); George Diepenbrock, *With iPads, Judges In Touch Any Time, Any Place*, LAWRENCE J WORLD (Feb. 5, 2012), http://www2.ljworld.com/news/2012/feb/05/ipads-judges-touch-any-time-any-place/ (last visited Dec. 14, 2012); Gregory T. Benefiel, *DUI Search Warrants: Prosecuting DUI Refusals*, THE KANSAS PROSECUTOR, Vol. 9, No. 1 (Spring 2012), *available at* http://www.kcdaa.org/Resources/Documents/KSProsecutor-Spring12.pdf

Louisiana: Mike Steele & Heather Harel, *State Police Say "No Refusal" Weekend Has Been Successful*, WBRZ.COM (Sept. 6, 2010),

http://www.wbrz.com/news/no-refusal-weekend/ (last visited Dec. 14, 2012); Raymond Legendre & Houma Courier, *No Refusal Weekend For Those Suspected Of DWI Has Critics, Supporters*, WWLTV.COM EYEWITNESS NEWS (Sept. 10, 2010), http://www.wwltv.com/news/local/No-Refusal-weekend-for-those-suspected-of-DWI-case-critics-supporters-102228604.html (last visited Dec. 14, 2012)

Michigan: Mich. Comp. Laws § 780.651; *State v. Snyder*, 449 N.W.2d 703 (Mich. Ct. App. 1989)

Mississippi: *McDuff v. State*, 763 So.2d 850 (Miss. 2000)

Missouri: *State v. McNeely*, 358 S.W.3d 65, 68 (Mo. 2012); Dana Fields, *Mo. Supreme Court Rejects Warrantless DWI Blood Test*, ASSOCIATED PRESS, Jan. 18, 2012, *available at* 1/18/12 AP Alert - MO (Westlaw)

Montana: Mont. Code Ann. § 61-8-402; Gwen Florio, *Judges Happily Lose Sleep Over Montana's New DUI Blood-draw Law*, THE MISSOULIAN (Dec. 18, 2011), http://missoulian.com/news/local/judges-happily-lose-sleep-over-montana-s-new-dui-blood/article_2bbe48e0-2922-11e1-917d-001871e3ce6c.html (last visited Dec. 14, 2012)

New Mexico: N.M. Stat. Ann. § 66-8-111; *State v. Hughey*, 163 P.3d 470 (N.M. 2007); *State v. Silago*, 119 P.3d 181 (N.M. Ct. App. 2005); *State* v. *Montoya*, 114 P.3d 393 (N.M. Ct. App. 2005); *State v. Duquette*, 994 P.2d 776 (N.M. Ct. App. 1999)

North Carolina: N.C. Gen. Stat. Ann. § 20-139.1(b5); Nat'l Highway Safety Transp. Admin., *Use of Warrants to Reduce Breath Test Refusals: Experiences From North Carolina*, DOT HS 811461

(Apr. 2011), *available at* www.nhtsa.gov/staticfiles/nti/pdf/811461.pdf

Ohio: Ohio Rev. Code Ann., § 4511.19(D)(1)(b); Mary Beth Quirk, *Ohio Cops Implementing "No-Refusal" DUI Weekend With Blood-Draw Warrants*, THE CONSUMERIST (Feb. 3, 2012), http://consumerist.com/2012/02/03/ohio-cops-implementing-no-refusal-dui-weekend-with-blood-draw-warrants/ (last visited Dec. 14, 2012); Jennifer Feehan & Erica Blake, *Refusing DUI Test Not Option - Wood Co. Authorities Seek Blood Draws If Drivers Object*, THE TOLEDO BLADE (Feb. 2, 2012), http://www.toledoblade.com/Police-Fire/2012/02/02/Refusing-DUI-test-not-option.html (last visited Dec. 14, 2012)

Oregon: Or. Rev. Stat. 813.320(2)(b); Nat'l Highway Traffic Safety Admin., *Use of Warrants For Breath Test Refusals: Case Studies*, DOT HS 810 852 (Oct. 2007), *available at* http://www.nhtsa.gov/DOT/NHTSA/Traffic%20Injury%20Control/Articles/Associated%20Files/810852.pdf

Tennessee: Tenn. Code Ann., § 55-10-406(a)(4)(A); *New DUI Law Leads To 8 Warrants For Blood Tests*, ASSOCIATED PRESS, July 10, 2012, *available at* 7/10/12 AP Alert – TN 19:11:38 (Westlaw); Kevin McKenzie, *'No Refusal' Labor Day Weekend To Combat DUI In Shelby, Tipton Counties*, THE COMMERCIAL APPEAL (Aug. 31, 2012), www.commercialappeal.com/news/2012/aug/31/no-refusal-labor-day-weekend-to-combat-dui-in/ (last visited Dec. 14, 2012)

Texas: Tex. Transp. Code Ann. § 724.011 et seq.; *Beeman v. State*, 86 S.W.3d 613 (Tex. Crim. App. 2002); Nathan Koppel, *Texas Blood Test Aims At Drunk Drivers*, WALL STREET JOURNAL (Dec. 11,

2011), *available at* http://online.wsj.com/article/SB10001424052970204397704577070700748380114.html

Utah: Jason Bergreen, *Utah Cops Praise Electronic Warrant System*, SALT LAKE TRIBUNE (Dec. 26, 2008), http://www.policeone.com/police-products/communications/articles/1769302-Utah-cops-praise-electronic-warrant-system (last visited Dec. 14, 2012)

Vermont: Vt. Stat. Ann. Tit. 23, § 1202 (f)

Washington: Wash. Rev. Code § 46.20.308(1); *City Of Seattle v. St. John*, 215 P.3d 194 (2009); *New Washington Law For DUI Blood Draw*, ASSOCIATED PRESS, Aug. 14, 2012, *available at* 8/14/12 AP Alert - WA 17:58:38 (Westlaw)

Wyoming: Wyo. Stat. Ann. § 31-6-102

ADDENDUM B

☐ H.G.N. (Horizontal Gaze Nystagmus) ☐ D.R.E. (Drug Recognition Expert)
☐ DUI investigation and apprehension ☐ Phlebotomy
☐ _____

I am investigating the crime of: ☐ DUI ☐ Aggravated DUI ☐ Aggravated assault ☐ Manslaughter ☐ Homicide
☐ _____

Phoenix Police Affidavit In Support Of Tele-Fax Search Warrant
(page one)

YOUR DEPARTMENT NAME
AFFIDAVIT IN SUPPORT OF **SEARCH WARRANT #** _____
TELE-FAX SEARCH WARRANT **REPORT #** _____
FAX TO: Judge _____ **Fax #** _____ **Phone #** _____
FROM: Sender: _____ **Fax #** _____ **Phone #** _____

Date: _____ **Officer's name** _____ **I.D. #** _____

Judge: This is _____ I.D.# _____ of the

I am faxing you this sworn affidavit to obtain a Tele-Fax search warrant in support of a:

☐ DUI ☐ Aggravated assault ☐ _____
☐ Aggravated DUI ☐ Homicide investigation

Please sign below as documentation that you swore me in via telephone with _____
I.D.# _____ standing by as a witness.

Judge: _____ **Affiant:** _____
of the _____ Court **Witness:** _____
(Justice of the Peace/Judge or Magistrate)

Judge: I have probable cause to believe that there is now in the blood or bodily fluids of:
_____ date of birth _____
Located at _____

The following substances to wit: ☐ alcohol ☐ drugs
☐ identifying characteristics (DNA)

Together with other evidence of the crime of:
☐ driving a vehicle while under the influence of intoxicating liquor and/or drugs
☐ actual physical control of a vehicle while under the influence of intoxicating liquor and/or drugs
☐ _____

As set forth in this affidavit, I Officer _____ your Affiant, am a peace officer in the State of Arizona, employed by _____ I have been a sworn peace officer for _____ years and have the following training and experience:

I have graduated from: ☐ A.L.E.T.A. ☐ The Arizona Law Enforcement Academy
☐ The Phoenix Police Academy ☐ _____

My training included identifying driver impairment due to alcohol or drugs. My duty assignments have included traffic, criminal and DUI investigations. I have specialized training in:
☐ H.G.N. (Horizontal Gaze Nystagmus) ☐ D.R.E. (Drug Recognition Expert)
☐ DUI investigation and apprehension ☐ Phlebotomy
☐ _____

I am investigating the crime of: ☐ DUI ☐ Aggravated DUI ☐ Aggravated assault ☐ Manslaughter ☐ Homicide
☐ _____

Phoenix Police Affidavit In Support Of Tele-Fax Search Warrant
(page two)

YOUR DEPARTMENT NAME
AFFIDAVIT IN SUPPORT OF **SEARCH WARRANT #** _____
TELE-FAX SEARCH WARRANT **REPORT #** _____
(Continued)

which I believe to have been committed on the _____ day of _____ at the time of _____ hours at the location of _____ in _____ County, State of Arizona, based on the following reasons and circumstances:

☐ Collision (describe location and circumstances): _____
☐ Driving behavior (list violations or physical control) _____

The driver license status of _____ is _____
In addition, the following observations of symptoms of consumption and/or impairment were made of _____
date of birth _____ by _____ of the _____

UNUSUAL ACTIONS	PUPILS	FACE
☐ puking	☐ equal	☐ dazed expression
☐ vomiting	☐ slow reaction	☐ flushed
☐ urinated	☐ dilated/constricted	☐ pale
other _____	other _____	other _____
ODOR OF ALCOHOL	**SPEECH**	**CLOTHING**
☐ faint	☐ slurred	☐ orderly
☐ moderate	☐ incoherent	☐ soiled
☐ strong	☐ profanity	☐ disarranged
other _____	other _____	other _____
ATTITUDE	**BALANCE**	**EYES**
☐ antagonistic	☐ swaying	☐ watery
☐ combative	☐ lost balance/fell down	☐ bloodshot
☐ mood swings	☐ staggering	other _____
other _____	other _____	

In addition: _____

I believe that the property, substances, and behavior that I have described in this affidavit are evidence of driving or being in actual physical control of a vehicle while under the influence of intoxicating liquor and/or drugs.

NIGHTTIME SEARCH WARRANT:

I believe that it is necessary to obtain this evidence after 10:00 PM and before 6:00 AM, for the reason that it is now _____ hours. Therefore, I cannot effectively serve and execute the warrant during the daytime. The evidence requested is of a perishable nature and a Time delay would render it useless.

Based on the preceding facts, I, _____ I.D.# _____ request that a Tele-Fax
☐ daytime ☐ nighttime search warrant to be issued. This concludes my affidavit Your Honor.

Affiant: _____
Witness: _____

Phoenix Police Affidavit In Support Of Telephonic Search Warrant (page one)

YOUR DEPARTMENT NAME
AFFIDAVIT IN SUPPORT OF **SEARCH WARRANT #** _____
TELEPHONIC SEARCH WARRANT **REPORT #** _____

DATE: _____ Officer's name _____ I.D. # _____

Judge: Hello?

Officer: Judge _____ . this is _____ I.D. # _____ of the Phoenix Police Department, will you swear me in please?

Judge: (The Judge swears you in.)

Officer: This is _____ of the Phoenix Police Department. I am calling you on (date & time) _____ with (name) _____ standing by as a witness.
I am calling for a telephonic search warrant and have just, probable, and reasonable cause to believe that there is now in the blood/body fluids of _____ date of birth _____
Located at _____ .

The following substances to wit: ☐ alcohol ☐ drugs
☐ identifying characteristics (DNA)
Together with other evidence of the crime of:
☐ driving a vehicle while under the influence of intoxicating liquor and/or drugs
☐ actual physical control of a vehicle while under the influence of intoxicating liquor and/or drugs
☐ _____

As set forth in this affidavit, that I, _____ your Affiant, am a peace officer in the State of Arizona, employed by the _____ I have been a sworn peace officer for _____ years and have the following training and experience:
I have graduated from: ☐ A.L.E.T.A. ☐ The Arizona Law Enforcement Academy
☐ The Phoenix Police Academy ☐ _____
My training included identifying driver impairment due to alcohol or drugs. My duty assignments have included traffic, criminal and DUI investigations. I have specialized training in:
☐ H.G.N. (Horizontal Gaze Nystagmus) ☐ D.R.E. (Drug Recognition Expert)
☐ DUI investigation and apprehension ☐ Phlebotomy
☐ _____

I am investigating the crime of: ☐ DUI ☐ Aggravated DUI ☐ Aggravated assault ☐ Manslaughter ☐ Homicide
☐ _____

Which I believe to have been committed on the _____ day of _____ at the time of _____ hours, at the location of _____ in the City of _____ State of Arizona, based on the following reasons and circumstances:

☐ Collision (describe location and circumstances): _____
☐ Driving behavior (list violations or physical control) _____

Phoenix Police Affidavit In Support Of Telephonic Search Warrant (page two)

YOUR DEPARTMENT NAME
AFFIDAVIT IN SUPPORT OF **SEARCH WARRANT #** _____
TELEPHONIC SEARCH WARRANT **REPORT #** _____
(Continued)

The driver license status of _____ is _____
In addition, the following observations of symptoms of consumption and/or impairment were made of _____
date of birth _____ by _____ of the _____

UNUSUAL ACTIONS	PUPILS	FACE
☐belching	☐equal	☐dazed expression
☐vomiting	☐slow reaction	☐flushed
☐urinated	☐dilated/constricted	☐pale
other _____	other _____	other _____
ODOR OF ALCOHOL	**SPEECH**	**CLOTHING**
☐faint	☐slurred	☐orderly
☐moderate	☐incoherent	☐soiled
☐strong	☐profanity	☐disarranged
other _____	other _____	other _____
ATTITUDE	**BALANCE**	**EYES**
☐antagonistic	☐swaying	☐watery
☐combative	☐lost balance/fell down	☐bloodshot
☐mood swings	☐staggering	other _____
other _____	other _____	

In addition: _____
_____
_____
_____

I believe that the property, substances, and behavior that I have described in this affidavit is/are evidence of driving or being in actual physical control of a vehicle while under the influence of intoxicating liquor and/or drugs.

NIGHTTIME SEARCH WARRANT:

I believe that it is necessary to obtain this evidence after 10:00 PM and before 5:00 AM, for the reason that it is now _____ hours, therefore, I cannot effectively serve and execute the warrant during the daytime. The evidence requested is of a perishable nature and a time delay would render it useless.

Based on the preceding facts, I, _____ I.D.# _____ request that a telephonic
☐ daytime ☐ nighttime search warrant to be issued. This concludes my affidavit Your Honor.

JUDGE: (await his/her reply)

Officer: I will now read verbatim to you the Standard Arizona Duplicate Original Search Warrant, State of Arizona, indicating which spaces I have completed.

Affiant _____
Witness _____

Arizona Department Of Public Safety Affidavit In Support Of Telephonic Search Warrant (page one)

ARIZONA DEPARTMENT OF PUBLIC SAFETY

AFFIDAVIT IN SUPPORT OF TELEPHONIC SEARCH WARRANT

DOCKET NUMBER	TODAY'S DATE	TIME	DR NUMBER

OFFICER NAME	I.D. NO	WITNESS NAME	SUSPECT NAME

Judge _____, this is Officer _____ I.D. No. _____ of the Arizona Department of Public Safety. I am requesting your assistance with a Telephonic Search Warrant in support of a:

☐ DUI investigation ☐ Aggravated assault investigation
☐ Aggravated DUI investigation ☐ Homicide investigation

My testimony is being recorded and Officer _____ I.D. No._____ standing by as a witness. Will you swear me in, please?

Witness: X_____ I.D. No:_____

Thank you, your Honor. I will now continue with the affidavit.

Judge, I have probable cause to believe that there is now in the blood or bodily fluids of (suspects name): _____, date of birth _____.

Located at: _____

The following substances and or property, to wit: _____

☐ alcohol and / or drugs ☐

Together with other evidence of the crime of:

☐ driving a motor vehicle while under the influence of intoxicating liquor or drugs
☐ actual physical control of a vehicle while under the influence of intoxicating liquor or drugs

As set forth in this affidavit, I, Officer _____ I.D. No. _____ your affiant, am a peace officer in the State of Arizona, employed by the Arizona Department of Public Safety. I have been a sworn peace officer for _____ years, and have the following training and experience:

I have graduated from: ☐ A.L.E.T.A. ☐ The Arizona Law Enforcement Academy
☐ The Phoenix Police Academy ☐ _____

Training included identifying driver impairment due to alcohol or drugs. My duty assignments have included traffic, criminal and DUI investigations. I have specialized training in:

☐ H.G.N. Horizontal Gaze Nystagmus ☐ D.R.E. Drug Recognition
☐ DUI investigation and apprehension ☐ Phlebotomy
☐ _____

I am investigating the crime of: ☐ DUI ☐ Aggravated DUI ☐ Aggravated assault ☐ Homicide
☐ _____

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[redacted] →

Arizona Department Of Public Safety Affidavit In Support Of Telephonic Search Warrant (page two)

ARIZONA DEPARTMENT OF PUBLIC SAFETY

AFFIDAVIT IN SUPPORT OF TELEPHONIC SEARCH WARRANT - (Continued)

DOCKET NUMBER	TODAY'S DATE	TIME	OFFENSE

Which I believe to have been committed on the ____ day of _____, 20___, at the time of _____ hours at the location of _____, in _____ County, Arizona, based on the following reasons and circumstances:

☐ Accident (describe location and circumstances): _____

☐ Driving behavior (list violations or physical control): _____

_____

_____

_____

The status of _____ driver license is _____.

In addition, the following observations of symptoms and / or impairment were made of _____, date of birth _____, by _____ of the ☐ Arizona Department of Public Safety ☐ Other agency _____

EYES	FACE	ODOR OF ALCOHOL	SPEECH	CLOTHING
☐ watery	☐ flushed	☐ faint	☐ slurred	☐ soiled
☐ bloodshot	☐ pale	☐ moderate	☐ incoherent	☐ disarranged / missing
☐ _____	☐ dazed expression	☐ strong	☐ profanity	☐ torn

BALANCE	ATTITUDE	INTESTINAL ACTIONS	PUPILS
☐ swaying _____	☐ antagonistic	☐ hiccough	☐ poor reaction
☐ staggering	☐ combative	☐ vomiting	☐ dilated
☐ lost balance / fell down	☐ mood swings	☐ urinating	☐ _____

In addition: _____

_____

_____

_____

_____

I believe that the property, substances, and behavior that I have described in this affidavit are evidence of driving or being in actual physical control of a vehicle while under the influence of intoxicating liquor or drugs.

NIGHT TIME SEARCH WARRANT: *(read this portion if applicable)*

I believe that it is necessary to obtain this evidence after 10:00 PM and before 6:30 AM, for the reason that it is now _____ hours, therefore, I cannot effectively serve and execute the warrant during the daytime. The evidence requested is of a perishable nature and a time delay would render it useless.

Based on the preceding facts, I, Officer _____ I.D. No._____, request that a Telephonic ☐ **daytime** ☐ **night time** search warrant to be issued. This concludes my affidavit Your Honor.

With your permission Your Honor, I will now read to you a Standard Duplicate Search Warrant.

Upon reading the warrant, read the following:

This concludes the reading of the Standard Duplicate Original Search Warrant, Your Honor. Do I have your permission to sign your name and execute the search warrant, Your Honor?

Affiant: X _____ Witness: X _____

STANDARD ARIZONA ORIGINAL SEARCH WARRANT
STATE OF ARIZONA

SEARCH WARRANT # _____
REPORT # _____

COUNTY OF , STATE OF ARIZONA

IN THE _____ COURT

Proof by affidavit having been made this day before me by _____ I.D # _____
of the _____ I am satisfied that there is probable cause to believe that:

☐ In the blood/body fluids of _____ date of birth _____

☐ Located at _____

in the State of Arizona, there is now being possessed or concealed certain property or substance(s) described as:

☐ Alcohol and/or ☐ drugs ☐ _____

together with other fruits, instrumentalities and evidence of a crime which property or things consists of any item or constitutes any evidence which tends to show that a public offense has been committed such being more fully described in the affidavit, to wit:

☐ Driving or in actual physical control of a vehicle while under the influence of intoxicating liquor and/or drugs.

☐ Aggravated driving or in actual physical control of a vehicle while under the influence of intoxicating liquor and/or drugs

☐ Aggravated assault

☐ Manslaughter

☐ Homicide

Which offense occurred on or about the _____ day of , , in _____, at or near the location of _____. _____ County, State of Arizona

you are therefore commanded:

☐ In the daytime (excluding the time period between 10:00 p.m. and 6:30 a.m.)

☐ In the nighttime (good cause therefore having been shown)

to make a search of the above named or described person(s) for the herein above-described substances, and if you find the same or any part thereof, to retain such in your custody or in the custody of the agency you represent, as provided by ARS §13-3920. Return this warrant to me within five (5) business days of the date thereof, as directed by ARS §13-3918.

Given under my hand and dated this _____ day of ,

JUDGE: _____ Affiant: _____

of the _____ Court Witness: _____

(Justice of the Peace, Judge or Magistrate)

Standard Arizona Search Warrant (page two)

Warrant Served: Date:_____ Time:_____

Receipt for property taken: _____

Reason for non-service: _____

ADDENDUM C

States That Expressly Allow Electronic Submission and Reception of Warrant Applications and Search Warrants

Ala. R. Crim. P. 3.8(b)

Alaska Stat. Ann. § 12.35.015

Ariz. Rev. Stat. Ann. §§ 13-3914(C), 13-3915(D), (E)

Ark. Code Ann. § 16-82-201

Cal. Penal Code § 1526(b)

Colo. Rev. Stat. Ann. § 16-1-106(3)(b)

Ga. Code Ann. § 17-5-21.1

Idaho Code Ann. §§ 19-4404, 19-4406

725 Ill. Comp. Stat. Ann. 5/108-4(a) (search warrants may be issued electronically following written complaints)

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Kan. Stat. Ann. §§ 22-2502(a), 22-2504

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Or. Rev. Stat. Ann. § 133.545(5)-(6)

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 11-1425

Supreme Court, U.S.
FILED
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In The
Supreme Court of the United States

MISSOURI,

Petitioner,

v.

TYLER G. McNEELY,

Respondent.

On Writ Of Certiorari To The Missouri Supreme Court

BRIEF OF AMICI CURIAE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, MISSOURI ASSOCIATION OF PROSECUTING ATTORNEYS, NATIONAL ASSOCIATION OF PROSECUTOR COORDINATORS, AND STATE PROSECUTING ATTORNEY ORGANIZATIONS (TOTALING THIRTY), IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Fourth Amendment Search and Seizure Clause is violated when, following a lawful arrest for driving under the influence of alcohol, the police take a blood sample from the defendant in a medically approved manner to obtain and preserve evidence of the defendant's blood alcohol level, without waiting to first obtain a search warrant.

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INTEREST OF AMICI CURIAE[1]

This brief is submitted by the National District Attorneys Association (NDAA), the Missouri Association of Prosecuting Attorneys (MAPA), the National Association of Prosecutor Coordinators (NAPC), and a consortium totaling thirty statewide associations or organizations representing the interests of prosecutors (the Prosecutors' Consortium), which, in addition to MAPA, includes: Alabama District Attorneys Association; Arizona Prosecuting Attorney's Advisory Council; Arkansas Prosecuting Attorneys Association; California District Attorneys Association; Colorado District Attorneys Council; Georgia Association of Solicitors-General; Idaho Prosecuting Attorneys Association; Illinois State's Attorneys Association; Iowa County Attorneys Association; Kansas County and District Attorneys Association; Kentucky County Attorneys Association; Kentucky Commonwealth's Attorneys Association; Louisiana District Attorneys Association; Prosecuting Attorneys Association of Michigan; Minnesota County Attorneys Association; Mississippi Prosecutors Association; Nevada District Attorneys Association; North Carolina Conference of

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[1] Pursuant to Supreme Court Rule 37.6, amici curiae state that no counsel for any party authored this brief in whole or in part, and that no entity or person, other than amici, their members, and their counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.3, amici state that counsel of record for all parties have consented in writing to the filing of this brief.

District Attorneys; Ohio Prosecuting Attorneys Association; Oklahoma District Attorneys Association; Oregon District Attorneys Association; South Dakota State's Attorneys Association; Tennessee District Attorneys General Conference; The Statewide Association of Prosecutors of Utah; Virginia Association of Commonwealth's Attorneys; Washington Association of Prosecuting Attorneys; West Virginia Prosecuting Attorneys Association; Wisconsin District Attorneys Association; Wyoming County and Prosecuting Attorneys Association.

NDAA is the largest and primary professional association of prosecuting attorneys in the United States, with approximately 7,000 members, including most of the nation's local prosecutors, assistant prosecutors, investigators, victim witness advocates, and paralegals. The mission of the association is, "To be the voice of America's prosecutors and to support their efforts to protect the rights and safety of the people."

MAPA is a non-profit, voluntary association of Missouri's 115 elected prosecutors, and approximately 300 assistant prosecutors and prosecutor investigators. MAPA strides to provide uniformity and efficiency in the discharge of duties and functions of Missouri's prosecutors, to promote high levels of professionalism amongst Missouri's prosecutors, and to continually advocate for positions that improve the criminal justice system statewide.

The members of the Prosecutors' Consortium share goals and missions similar, if not virtually identical, to that of NDAA and MAPA. As prosecutors,

every member of amici is a minister of justice and charged with ensuring not only that the guilty are appropriately punished, but that the innocent do not suffer. All share the interest of seeing clear resolution to the issues presented in this case that touch upon the collection of evidence that not only can serve to hold offenders accountable, but also to spare innocent individuals from being charged with a crime they did not commit.

NAPC is a voluntary, professional association of the nation's prosecutor coordinators, who are those individuals or offices in each state which are charged with coordinating the actions of prosecutors in areas such as advocacy, training or technical assistance and support. NAPC has an interest in seeing a uniform approach to issues such as the collection of blood-alcohol evidence in impaired driving cases to ensure more uniformity for the constituent prosecutors its members serve.

This case raises matters of concern to prosecutors nationwide. The decision by the Court in this case will affect how evidence is collected in impaired driving cases. Because of the mobile society in which we live and the prevalent use of automobiles on our nation's interstate highway system, the public safety of our nation will be enhanced by a ruling from the Court enunciating a bright line rule applying the exigent circumstances exception to the Fourth Amendment to warrantless blood draws in impaired driving cases. Impaired driving cases are a major portion of prosecution case loads nationwide, and have a significant impact on society.

Amici have expertise in the matters pending before the Court in this case, and believe that their brief will be helpful in this Court's decisions on these matters.

SUMMARY OF ARGUMENT

Search and seizure without warrant is permitted in exigent circumstances. Blood alcohol dissipation presents such an exigent circumstance, because it continually destroys evidence with the passage of time. A non-consensual blood draw represents a minimal intrusion on the person, which is outweighed by society's significant interest in preventing impaired driving, and enforcing the laws dealing with under the influence drivers.

Respondent's arguments that there is no need for a uniform rule are based on alternatives that are impractical and unworkable. A case by case, "special facts" test provides no realistic guidance for law enforcement, prosecutors, or the courts. The use of retrograde extrapolation of blood alcohol content is not an adequate remedy for the evidence lost when a blood sample is delayed. Proposals to rely on improved communications technology to speed the warrant process cannot address all aspects of the delay, and given the wide range of variables, are an unsatisfactory basis for a national rule.

ARGUMENT

I. Alcohol Dissipation in the Body is an Exigent Circumstance Justifying Seizure of Blood Without the Delay of Obtaining a Search Warrant in an Impaired Driving Case

This case presents the question of how far the rule announced in *Schmerber v. California*, 384 U.S. 757 (1966) extends. In *Schmerber*, this Court held it did not violate the Fourth Amendment when an officer caused the defendant's blood to be drawn without a search warrant, after his arrest, in order to prevent the continuing destruction of evidence of alcohol intoxication. 384 U.S. at 770-771. *Schmerber* involved an automobile crash, where the defendant was transported to a hospital for medical treatment. The present case involved an arrest for impaired driving, not after a crash, but rather after an ordinary police traffic stop for speeding, followed by the officer's observation of the defendant's symptoms of alcohol ingestion and impairment. The question is whether that distinction merits suppression of the evidence obtained from the warrantless blood draw.

A. Search and Seizure is Permitted Without a Warrant When There is the Exigent Circumstance of Imminent Destruction of Evidence

The Fourth Amendment prohibits searches that are unreasonable. The general rule enunciated by

this Court is that a search without a warrant is per se unreasonable. *Katz v. United States*, 389 U.S. 347, 357 (1967). This rule, however, is subject to certain exceptions. One is the existence of probable cause combined with exigent circumstances. *Id.*; *Vale v. Louisiana*, 399 U.S. 30, 35 (1970). Exigency exists – and the warrant requirement may be excused – when the circumstances present a "now or never" situation, such that if the evidence is not seized at the time, the opportunity will be lost. *Vale*, supra, 399 U.S. at 34-35; *Roaden v. Kentucky*, 413 U.S. 496, 505-506 (1973); *Chambers v. Maroney*, 399 U.S. 42, 50-51 (1970).

Thus, there are exigent circumstances when there is a compelling need to act, and no time to secure a warrant. *Michigan v. Tyler*, 436 U.S. 499, 509 (1978). Imminent destruction of evidence is one such circumstance, in which the need to obtain a search warrant (with the delay that process necessarily entails) may be excused. *Id.*; *United States v. Bartelho*, 71 F.3d 436, 442 (1st Cir. 1995); *United States v. Wilson*, 36 F.3d 205, 209-210 (1st Cir. 1994).

Applying these principles to the case at hand, it is clear that the facts involved in an impaired driving stop such as the one at bar present exigent circumstances, due to the imminent destruction of evidence, that justify seizure of the defendant's blood without the delay involved in obtaining a search warrant.

B. In an Impaired Driving Case, Blood Alcohol Dissipation is the Destruction of Evidence as to Blood Alcohol at the Time of Driving

It is a matter of common experience, pre-dating modern scientific research, that as one ingests alcohol, the effects on the body and nervous system do not remain static, but change over time.

The groundbreaking toxicological research into alcohol metabolism in the human body was done by Erik Widmark in the 1930s. See Andreasson and Jones, "The Life and Work of Erik M. P. Widmark," *The American Journal of Forensic Medicine and Pathology*, v. 17(3), Sept. 1996, pp. 177-190. Since that work, a wide variety of research has enhanced our knowledge about the various factors that may affect the rate at which the body absorbs and then eliminates alcohol. See, e.g., Jones and Jonsson, "Peak Blood-Ethanol Concentration and the Time of Its Occurrence After Rapid Drinking on an Empty Stomach," *Journal of Forensic Sciences*, Vol. 36, No. 2, March 1991, pp. 376-385; Watkins and Adler, "The Effect of Food on Alcohol Absorption and Elimination Patterns," *Journal of Forensic Sciences*, Vol. 38, No. 2, March 1993, pp. 285-291; Jones and Jonsson, "Food-Induced Lowering of Blood Ethanol Profiles and Increase Rate of Elimination Immediately After a Meal," *Journal of Forensic Sciences*, Vol. 39, No. 4, July 1994, pp. 1084-1093.

In *Mata v. State*, 46 S.W.3d 902 (Tex. 2001) (overruled on other grounds in *Bagheri v. State*, 87

S.W.3d 657 (Tex. 2002)), the Texas Court of Criminal Appeals gave a succinct summary of the significant points about how alcohol is metabolized, the variables affecting that process, and how those matters come into play when blood alcohol evidence is used in court:

> As alcohol is consumed, it passes from the stomach and intestines into the blood, a process referred to as absorption. When the alcohol reaches the brain and nervous system, the characteristic signs of intoxication begin to show. The length of time necessary for the alcohol to be absorbed depends on a variety of factors, including the presence and type of food in the stomach, the person's gender, the person's weight, the person's age, the person's mental state, the drinking pattern, the type of beverage consumed, the amount consumed, and the time period of alcohol consumption. At some point after drinking has ceased, the person's BAC [blood alcohol content] will reach a peak. After the peak, the BAC will begin to fall as alcohol is eliminated from the person's body. The body eliminates alcohol through the liver at a slow but consistent rate.
>
> In 1932, Swedish chemist E.M.P. Widmark . . . created what we know today as the "BAC curve," which represents the rise and fall of an individual's BAC as his body absorbs and eliminates alcohol. A reading from a single [blood or] breath test will not reflect where the person is on his BAC curve.

> In other words, it will not indicate whether the person is in the absorption phase, at his peak, or in the elimination phase.
>
> So if a driver is tested while in the absorption phase, his BAC at the time of the test will be higher than his BAC while driving. If tested while in the elimination phase, his BAC at the time of the test could be lower than while driving, depending on whether he had reached his peak before or after he was stopped. *Obviously, the greater the length of time between the driving and the test, the greater the potential variation between the two BACs.*

46 S.W.2d at 909-910 (emphasis added).

The significance of these principles to the case at bar is plain. If police officers must take the time to obtain a search warrant authorizing a blood draw from the arrested subject, the human body will continue to eliminate alcohol, which equates to the destruction of evidence. The need to resort to retrograde extrapolation estimates for evidence of the blood alcohol level at the time of driving confirms the exigency. Retrograde extrapolation is simply a method for estimating how much alcohol has been eliminated from the body – in other words, how much evidence has been destroyed. The longer the delay, the greater potential for variation or inaccuracy between the estimate of the blood alcohol level at the time of driving and the time the sample was taken.

The evidentiary value of any substantial delay in the taking of a blood sample has not been lost on the criminal defense bar. One leading manual on DUI defense, *Defending Drunk Drivers*, by Patrick T. Barone (James Publishing Co., Rev. 28, March 2012), states:

> In nearly every case, there is a difference between the time of driving and the time of the chemical test, and prosecutors have relied on retrograde extrapolation to argue that the subject's blood alcohol content would have been higher at the time of the arrest or driving . . . The longer the period of time between the test and the violation, the greater the likelihood of error in using retrograde extrapolation.
>
> Barone, *Defending*, § 203.

Barone's manual goes on to provide a section specifically devoted to attacking retrograde extrapolation evidence (§ 203.3), as well as two sections on how to effectively present "The Rising Blood Alcohol Defense," (§§ 204, 204.1) (also sometimes called the "last gulp" defense, referring to the contention the driver had a last, large gulp of alcoholic beverage just before driving, which had not been fully absorbed into his system at the time of driving, but had been absorbed by the later time when the blood sample was taken). Central to these attacks are the time delay between the driving and the chemical test. See also, Lawrence Taylor and Steve Oberman, *Drunk Driving Defense* (Aspen Publishers 2010), § 6.03.

The problem this situation poses for presenting accurate, reliable evidence in court is not limited to defense arguments to the jury that the prosecution has not met its burden of proof. In some instances, courts have excluded altogether evidence of the blood alcohol test, ruling that the variables that effect retrograde extrapolation estimates, highlighting the delay in taking the sample, render the evidence too speculative to pass reliability standards for purposes of admissibility. In *Mata v. State*, supra, the court observed that the delay of over two hours between the driving and the test, " . . . is a significant amount of time and seriously affects the reliability of any extrapolation." 46 S.W.3d at 917. The Court of Criminal Appeals of Texas ruled the trial court had abused its discretion in admitting the blood alcohol evidence, and reversed the conviction,

Similarly, in *State v. The Eighth Judicial District Court of the State of Nevada (RPI Bobby Armstrong)*, 267 P.3d 777 (2011), the Nevada Supreme Court affirmed a trial court order excluding retrograde extrapolation evidence offered by the prosecution, because too many variables to make evidence sufficiently reliable, including the length of time between offense and blood draw (2 hours, 20 minutes). The Court stated, "The admission of retrograde extrapolation evidence when a single blood draw was taken more than two hours after the crash and the extrapolation calculation is insufficiently tethered to individual factors necessary to achieve a reliable calculation potentially invites the jury to determine Armstrong's

guilt based on emotion or an improper ground – that the defendant had a high blood alcohol level several hours later – rather than a meaningful evaluation of the evidence." 267 P.3d at 783.

When considered against this backdrop, the delay that it takes to obtain a warrant is not inconsequential. A research study published by the U.S. Department of Transportation, National Highway Traffic Safety Administration (NHTSA), examining the experience with test refusal warrants in four states (Arizona, Michigan, Oregon and Utah) found the entire process can take 90 to 120 minutes. Hedlund and Bierness, "Use of Warrants for Breath Test Refusals: Case Studies," Publication No. 810852, U.S. Department of Transportation, NHTSA, October 2007, p. vii. The additional time for the warrant component alone measured in a single state (Arizona) was reported at up to 90 minutes. *Id.*, p. 13. When put in the context described above concerning the impact that any test delay has on the evidence in court, this is not insignificant.

Delay in obtaining a warrant should also be considered in terms of the times when impaired driving offenses are most commonly committed. While impaired driving can happen any day of the week, and any time of day, most do not happen during "weekday business hours." Data from Minnesota confirms what common sense suggests. The Minnesota Office of Traffic Safety reports that in 2011, exactly 49.9% of impaired driving incidents (14,601 out of 29,257) occurred on Saturday and Sunday. See Office

of Traffic Safety, Minnesota Department of Public Safety, "Minnesota Impaired Driving Facts 2011" (publ. 2011). When one considers that at least an appreciable portion of the incidents occurring Monday through Friday must have occurred after 5:00 p.m., it is clear a majority of impaired driving incidents occur outside of weekday business hours. In many jurisdictions, this circumstance will further impact how readily a warrant can be obtained, and the delay that a warrant requirement will entail. See, e.g., *Smith v. State*, 942 So.2d 308 (Miss. 2006), where the defendant was involved in a collision shortly before 8:57 p.m. on a Saturday evening, then refused a chemical test; obtaining a warrant and transporting the defendant for the blood draw resulted in a four hour delay until the blood draw.

In summary, delay in taking a blood sample in an impaired driving case leads to the destruction of evidence, which can and does undermine not only the weight of any evidence, but even its admissibility. The time it takes to obtain a warrant to authorize a blood draw adds to this delay.

C. A Non-consensual Blood Draw is a Minimal Intrusion on the Person

As this Court noted in *Schmerber*, and reiterated in *Winston v. Lee*, 470 U.S. 753 (1985), "blood tests do not constitute an unduly extensive imposition on an individual's personal privacy and bodily integrity." *Winston*, 470 U.S. at 762. Indeed, this Court observed

that blood tests are common place in modern life for such things as medical examinations, marriage licenses, entrance to the military, entrance to some colleges, and the voluntary action millions have undertaken as blood donors. *Id. Schmerber,* supra, 384 U.S. at 771, fn. 13. A simple, everyday blood test is a far cry from the more invasive bodily intrusions that this Court and others have condemned. See *Rochin v. California*, 342 U.S. 165 (1952) (forcible administration of an emetic by way of a stomach tube, to induce vomiting in order to recover narcotics evidence); *People v. Scott*, 21 Cal.3d 284 (1978) (forcible manipulation of the prostate by digital rectal means to obtain semen sample for STD testing); *Winston v. Lee*, supra (surgical removal under general anesthetic of a bullet lodged in a robbery suspect's chest).

It is also worth noting that the use of actual force to take the blood sample, with or without a warrant, is relatively rare. Experience in states that have forced blood draw procedures has found that when a refusing subject is faced with the alternative of actual restraint and force being used to accomplish the taking of a blood sample, most offenders elect not to put up physical resistance, making actual use of force a rare occurrence. Voas, Kelley-Baker, Roman, and Vishnuvajjala, "Implied-Consent Laws: A Review of the Literature and Examination of Current Problems and Related Statutes," *Journal of Safety Research*, Vol. 40(2), 2009, p. 77, at p. 82. Thus, fears about the widespread use of restraint chairs, gurneys, straps,

chains, cuffs, or multiple officers piling on to physically restrain a subject during the blood draw procedure need not be a part of any consideration of the actual imposition on the individual. Such measures are likely to be used rarely, if at all. Any measures that go beyond taking the blood in a medically approved manner, or in some unconscionable way, can be addressed on a case by case basis.

D. The Societal Interest in Obtaining and Preserving Fresh Evidence of Blood Alcohol Level is Great, Due to the Importance of Public Protection from the Danger that DUIs Represent

In addition to the importance of preserving evidence, the state's interest is also heightened due to the nature of the crime, and the serious impact it has. More than twenty years ago, this Court stated, "No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it. . . . For decades, this Court has 'repeatedly lamented the tragedy.' . . . [citation omitted] 'The increasing slaughter on our highways . . . now reaches the astounding figures only heard of on the battlefield.'" *Michigan Department of State Police v. Sitz*, 496 U.S. 444, 451 (1990). Today, the statistics still tell a dreadful story. The National Highway Traffic Safety Administration reported in 2008 there are nearly 1.4 million driving under the influence arrests in the United States each year. "Blood Alcohol Concentration Test Refusal Laws," Publication 810884,

U.S. Department of Transportation, NHTSA, January 2008. NHTSA also reported that in 2010, alcohol-impaired-driving-crashes (driver with a BAC of .08% or higher) resulted in 10,228 fatalities. See "Alcohol Impaired Driving," Publication 811606, U.S. Department of Transportation, NHTSA, April 2012. While this figure is actually an improvement over those discussed in 1990 in *Michigan Department of State Police*, supra, it is still shocking – approximately one fatality every 51 minutes. Further, these statistics only include fatal crashes. They do not include the thousands of cases where the victims survive, with injuries ranging from minor to serious, sometimes involving permanent dismemberment, disfigurement, or disability. Nor do they include cases where the impaired driving was due to drugs rather than alcohol.

This major societal interest is not sufficiently vindicated by the operation of implied consent laws. All fifty states have such statutes, under which a driver is deemed to have consented to giving a blood alcohol test after being lawfully arrested for driving under the influence. See, "Digest of Impaired Driving and Selected Beverage Control Laws," 26th edition, Publication 811763, U.S. Department of Transportation, NHTSA, June 1, 2011. The sanction for refusal to comply by giving a test vary from state to state, but generally involve suspension of driving privileges; eight states have a criminal sanction for refusal. *Id.* But these laws, with their sanctions, do not sufficiently address the problem of persons who refuse to take a blood alcohol test.

A 1991 study published by NHTSA found that even though all states had implied consent laws, refusal rates state to state varied from 2% to 70%, with a mean of 19%. Jones, Joksch and Wiliszowski, "Implied Consent Refusal Impact," Publication 807765, U.S. Department of Transportation, NHTSA, September 1991, p. xvi. By 2008, NHTSA published data showing that the mathematical mean rate for refusal rates for the states was 25% in 2001 and 22% in 2005 (with one state having a refusal rate of 81%). "Refusal of Intoxication Testing: A Report to Congress," Publication 811098, U.S. Department of Transportation, NHTSA, September 2008, p. 6. See also, Voas, et al., supra, which (at p. 80) compiles a table of 14 studies from 1986 to 2007 dealing with impaired driving blood alcohol test refusal rates.

For many offenders, accepting the penalty for refusing to submit to a chemical blood test under the implied consent law is a preferable alternative to suffering a criminal conviction under the impaired driving statutes. Voas, et al., supra, at p. 78. A study of conviction rates when a defendant has given a test, compared to when a defendant refused to give a test, confirms what should seem obvious – there are fewer convictions when the defendant denies the prosecution a key piece of evidence by refusing to take a blood alcohol test. Ross, Simon, Cleary, Lewis, and Storkamp, "Causes and Consequences of Implied Consent Test Refusal," *Alcohol, Drugs and Driving*, Vol. 11, No. 1 (1995), p. 57, at p. 60. Indeed, every step of the enforcement and prosecution process is

negatively impacted by blood alcohol test refusals. Voas et al, supra, at p. 80.

Finally, it is worth noting that this case, like *Schmerber*, presents the issue of a non-consensual blood draw *after* a lawful arrest. This is significant for two reasons. First, society's interest in enforcing impaired driving laws is greater when officers have observed and gathered current facts establishing probable cause that the defendant has committed an offense. Second, if the officer has acted without probable cause, then the defendant's rights are protected through the suppression of the evidence that was obtained as a fruit of the unlawful arrest. *Florida v. Royer*, 460 U.S. 491, 501 (1983).

Sadly, driving under the influence remains a major problem in this country, with consequences that are too often tragic. Statutes which make driving under the influence a crime are not effective if defendants cannot be convicted. Implied consent laws are not a sufficient means to insure that drivers under arrest will comply with their obligation to provide a chemical blood test. When they refuse to do so, the prosecution is deprived of evidence necessary to enforce the impaired driving laws. The interest society has in preventing DUIs and protecting the public from impaired drivers, combined with the harm the state's evidence suffers when a blood alcohol chemical test is delayed, when weighed against the minimal intrusion represented by taking a blood sample, lead to the conclusion that taking such a sample without a warrant, following a lawful arrest,

is not an unreasonable search and seizure under the Fourth Amendment.

II. Respondent's Proposed Rule is Impractical and Unworkable as a National Rule of Search and Seizure

Respondent argues that there is no need for a blanket rule allowing warrantless blood draws in cases where a person under arrest for impaired driving refuses to submit to a chemical test. He argues that these cases can be examined on a case by case basis and that warrantless draws should be allowed only where "special facts" exist. He argues that warrantless draws are not necessary because retrograde extrapolation can be used to estimate a person's blood alcohol content at the time of driving. Finally, he argues that technological advances have made it easier and quicker to obtain a search warrant. For the reasons stated below, none of these arguments should succeed in limiting the application of the exigent circumstances exception in impaired driving cases.

A. Case by Case Analysis is an Unworkable, Impractical Rule

The approach taken by the Missouri Supreme Court in the case at bar, and by some other courts, is to allow a warrantless blood draw under the exigent circumstances exception only where "special facts," in addition to the rapid dissipation of alcohol from the

blood, also exist. *State v. Rodriguez*, 156 P.3d 771, 776 (Utah 2007); *State v. Johnson*, 744 N.W.2d 340, 344 (Iowa 2008); see also *Bristol v. Commonwealth*, 272 Va. 568, 577, 636 S.E.2d 460, 464 (Va. 2006). The rule in these cases seems to be that every case should be evaluated on its own facts to determine whether exigent circumstances existed. This approach is unworkable and impracticable.

The opinion of the Missouri Supreme Court and the other cases employing a special facts analysis seem to hold special facts exist where a traffic crash has occurred. This approach not only improperly dismisses the significance of the exigency due to the destruction of evidence, it also leaves too many practical questions unanswered. These cases do not make it clear whether a crash is a requirement for a warrantless draw. They do not state whether a warrantless draw is authorized in every crash, or if it is, whether this effectively creates a "traffic crash" exception to the warrant requirement.

The "special facts" cases also seem to presume that efforts to secure a warrant will be delayed by the investigation of a crash. Not every crash is the same. Many variables may be involved, including:

- Whether the crash is minor
- Whether the suspect is transported to a hospital
- Whether the crash requires extensive investigation

- Whether specialized law enforcement units exist to investigate separately the crash and the impaired driving offense
- Whether the crash occurs in close proximity to a judge who can review and sign a warrant
- Whether the crash occurs in an isolated area
- Whether the crash is discovered immediately or only after some delay
- Whether an officer can determine when the crash occurred

A rule requiring a case by case analysis of whether special facts creating exigency exist gives the officer in the field no guidance as to which of these crash factors may be important, and how they are to be weighed.

The "special facts" line of cases provides little to no direction as to what other circumstances, if any, will also constitute the "special facts" necessary to authorize a warrantless draw. Again, a myriad of potential circumstances can exist which will cause a delay in securing a sample:

- Whether a suspect flees the scene and is not immediately found
- Whether it is necessary to travel a lengthy distance to secure a warrant

- Whether it is necessary to travel a lengthy distance to reach an authorized, qualified blood drawer
- Whether a suspect initially agrees to a breath test but then refuses to cooperate in providing a valid sample
- Whether an officer is able to contact a judge
- Whether an officer is required to make multiple attempts to contact a judge
- Whether an officer is required to attempt to contact multiple judges

In any given impaired driving arrest, there are simply too many potential variables which an officer may be required to analyze to determine whether he will be able to meet the showing of "special facts" required by this approach, when things have gone so far that exigency exists.

Moreover, it is undisputed that the body begins to eliminate alcohol after drinking, destroying relevant evidence of impairment almost immediately. *Schmerber*, supra, 384 U.S. at 770-771; *Skinner v. Railway Laborer Executives' Association*, 489 U.S. 602, 623 (1989). This presents a different situation than other types of cases applying the exigent circumstances exception to allow a warrantless search. In a narcotics case, for instance, officers merely *believe* that evidence may *potentially* be destroyed, through a voluntary action taken by the suspect. In an impaired driving case, once it is clear the defendant has ingested

alcohol, officers *know* that evidence is *certainly* being destroyed, through a biological process that is not a matter of choice or voluntary action on anyone's part. Questions about how long the delay must be before exigent circumstances exist to justify a warrantless blood draw are really questions about how much evidence an officer must allow to be destroyed.

The rule proposed by respondent and adopted by the Missouri Supreme Court leaves questions like these unanswered, with little guidance how to determine when a warrant is required, or when a warrantless blood draw will be acceptable. Indeed, many of the factors that might affect exigency are things an officer in the field might not even be aware of, or might not have the ability to control. *State v. Shiner*, 751 N.W.2d 538, 549 (Minn. 2008) (cert. den., 555 U.S. 1137). Requiring additional "special facts" before exigent circumstances can be found is an unworkable rule. It would effectively preclude the application of the well settled exigent circumstance/destruction of evidence exception in impaired driving cases. If this Court adopted such a rule, the only certainty is that any blood draw done without consent or a warrant will be challenged in a motion to suppress and be the subject of future appeals.

Other courts have concluded that *Schmerber* should not be read to leave officers who enforce impaired driving laws with such an unworkable, uncertain standard. *State v. Shiner*, supra, 751 N.W.2d at 549 (Minn. 2008) (cert. den., 555 U.S. 1137); *People v. Thompson*, 38 Cal.4th 811, 135 P.3d 3 (2006) (cert. den., 549 U.S. 980); *State v. Bohling*, 173 Wis.2d

529, 494 N.W.2d 399 (1993) (cert. den., 510 U.S. 836). This Court should remove the uncertainty and clarify what was alluded to in *Schmerber* – a clear rule that police may secure a timely chemical test from individuals arrested for impaired driving, without the delay of obtaining a warrant.

B. Retrograde Extrapolation is Not a Substitute for a Timely Test

Respondent also argues it is not necessary to allow warrantless blood draws in most impaired driving cases because a defendant's blood alcohol content (BAC) at the time of driving can be determined through retrograde extrapolation. In other words, it is permissible for officers to allow relevant evidence to be destroyed because an estimate of the person's BAC can be calculated from a test conducted up to several hours later. Again, this is an unworkable and impracticable solution.

Retrograde extrapolation is a method for estimating what a person's BAC may have been at an earlier time based on one or more chemical tests. As noted above, this estimation is done by using a formula that takes into account, among other things, the person's gender, age, height and weight, how much alcohol was consumed, what type of alcohol was consumed, the time period over which the alcohol was consumed, whether and when the person had consumed food, the rate at which a person eliminates alcohol from his or her system, and how much time elapsed between the last drink and the test. Much of this is information

could only be provided by the impaired driving suspect. He or she may not accurately remember these details (especially considering the level of impairment present), or may be inclined to falsify. Moreover, while an officer can ask for this information, the suspect can simply refuse to provide it.

Also, while it is generally accepted that the human body eliminates alcohol at a rate of approximately .015% per hour, various factors can affect the actual elimination rate. *Thompson*, supra, 38 Cal.4th at 826. For these reasons, a BAC calculated using retrograde extrapolation will never be as accurate as a test done in closer proximity to the driving. It will always be more of an *estimate* of alcohol concentration rather than a true *measurement*, with the amount of uncertainty increasing the longer the delay between the driving and the test.

Further, as noted in section I above, concerns about accuracy and reliability have led some courts to reject the admission into evidence of retrograde extrapolation to prove what a person's BAC was at the time of driving. See, e.g., *State v. Eighth Judicial Circuit of Nevada*, supra, 267 P.3d 777, affirming the exclusion of such evidence; likewise, *Mata v. Texas*, supra, 46 S.W.3d 902 (Texas 2001). And even when the evidence was admitted, the court in *Commonwealth v. Modaffre*, 529 Pa. 101, 601 A.2d 1233 (Pa. 1992), held that evidence of a BAC of .108% from a blood sample taken one hour and fifty minutes after the driving was insufficient to prove the defendant guilty beyond a reasonable doubt, when the threshold level for a violation was .10%.

When such evidence is admitted at trial, for all the reasons outlined above, it is subject to attack by the defense in front of the jury. Any change in one of the variables used in the analysis can lead to a different result. Because a BAC calculation using retrograde extrapolation is nothing more than an estimate, the introduction of this evidence often turns into a battle of expert witnesses. It is not unusual for defense experts to manipulate the formula to reach a result that "proves" a defendant was below the per se limit for alcohol at the time of driving, turning retrograde extrapolation into a defense weapon to create reasonable doubt. See Barone, *Defending*, supra, § 202.

Finally, although the case at bar involves a suspect who was under the influence of alcohol, driving under the influence of other drugs is also common. Retrograde extrapolation cannot generally be used to estimate how much of a particular drug may have been in a person's system at the time of driving because of the way most drugs are metabolized. Sarah Kerrigan, *Drug Toxicology for Prosecutors*, American Prosecutors Research Institute, 2004, at p. 16 (available online at http://www.ndaa.org/pdf/drug_toxicology_for_prosecutors_04.pdf). As such, when someone is suspected of being under the influence of a drug other than alcohol, any delay in securing a blood sample causes relevant evidence of impairment to be irretrievably lost, because, "it is generally not possible to extrapolate backwards from some known drug concentration to some earlier time and concentration." *Id.*

For all these reasons, the possibility of using retrograde extrapolation to estimate a person's BAC at the time of driving is simply not a viable alternative to a test taken as close in time to the driving behavior as possible. A timely test is the only thing that will provide an accurate measurement of the person's actual BAC.

C. Technology Does Not Provide an Adequate Remedy to the Delay in Obtaining a Search Warrant

Respondent also argues that improvements in technology have streamlined the process such that warrants can be easily and quickly obtained. While it is undeniable that communications ability has seen many improvements since 1966, those improvements do not provide a complete remedy to the problem of delay required to obtain a warrant.

The process of obtaining a search warrant will involve several steps – preparation of the warrant forms; preparation of the affidavit in support of the warrant; locating the judge; presenting the judge with the warrant and affidavit; the judge finding the opportunity to review the warrant application; the judge reading the search warrant affidavit and forms; the judge approving the warrant; the judge forwarding the approved warrant to the officer. Communications technology can only affect part of the warrant process – the part that would involve transporting the warrant and affidavit to the judge. It

will not affect the preparation steps, the effort to locate a judge, or the time for the judge to review the warrant and affidavit. In particular, the ability of the judge to review the warrant at that minute may well be affected by the day and even the time of day.

Next, one must recognize that the availability of communications technology will vary from state to state, and even within a state, from county to county. The simple existence of technology does not necessarily mean it is practically available as a solution for quickly securing a search warrant. Moreover, the procedures and requirements for securing a search warrant vary widely by state and even by jurisdiction within a state. Thus, while states or local jurisdictions may certainly choose to employ modern communications technology as part of the process for securing a warrant, the variables involved means this does not necessarily represent a viable solution that can be deployed nationwide.

In short, the existence of improved communications technology does not necessarily mean that technology will provide a practical means to quickly secure a warrant, in all states and counties, at any time. The number of steps in the process, the fact that several parts of the process are not at all shortened by improved communications technology, and the variables involved from one local jurisdiction to another, all counsel against relying on technology as the basis for a national rule.

CONCLUSION

Impaired driving represents a major problem for society and law enforcement. It has a great impact on the community, with tragic consequences for many innocent victims. In response to this problem, timely blood alcohol testing of arrested suspects is a key component of enforcement efforts to hold impaired driving in check, and roll back its terrible impact. The rule that respondent urges would delay blood alcohol testing, with a negative impact. The biological processes that eliminate alcohol from the body destroy evidence, and represent an exigent circumstance. Amici urge this Court to rule that the minimal intrusion of a blood test, when conducted without a warrant, after a lawful arrest, is not unreasonable for an impaired driving suspect.

Date: November 16, 2012

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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In The Supreme Court of the United States

STATE OF MISSOURI,

Petitioner,

v.

TYLER G. MCNEELY,

Respondent.

On Writ of Certiorari to the Missouri Supreme Court

BRIEF OF THE RUTHERFORD INSTITUTE AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a law enforcement officer may obtain a nonconsensual and warrantless blood sample from a drunk driver under the exigent circumstances exception to the Fourth Amendment warrant requirement based upon the natural dissipation of alcohol in the bloodstream.

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INTEREST OF *AMICUS*[1]

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues.

SUMMARY OF THE ARGUMENT

Amicus submits that this case – like thousands of other suspected drunk driving cases – could have been resolved in a manner that secured the blood alcohol evidence necessary to secure a conviction of Respondent, while at the same time protecting Respondent's constitutional rights. Indeed, States throughout the nation, including Petitioner, have procedures that allow for expeditious warrants to be issued in cases such as this, and Petitioner's sister States routinely use these procedures without difficulty. For these reasons, Petitioner's request for a per se rule permitting warrantless nonconsensual blood samples

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[1] Pursuant to Sup. Ct. R. 37.6, *Amicus* certifies that no counsel for a party to this action authored any part of this *amicus curiae* brief, nor did any party or counsel to any party make any monetary contribution to fund the preparation or submission of this brief. Counsel of record for the parties to this action have filed letters with this Court consenting to *amicus curiae* briefs on behalf of either party.

of suspected drunk drivers is unnecessary and must therefore be rejected.

ARGUMENT

I. A Per Se Rule Permitting Warrantless Nonconsensual Blood Samples of Suspected Drunk Drivers is Impermissible.

Amicus recognizes that evidence of drunk driving must be obtained quickly after a suspect is arrested. *Amicus* contends, however, that this can be achieved through compliance with the warrant process and that there is no justification for a per se rule eliminating this, as requested by Petitioner. Only in this way can both the needs of States in ridding the nation's roads of drunk drivers and upholding constitutional protections be met. As one scholar has noted, "[i]f . . . the state can further both its own interests in highway safety and the individual's interests in personal integrity, the choice must favor the least intrusive, effective alternative."[2]

Bodily intrusions for the extraction of blood, however routine, "plainly involve[] the broadly conceived reach of a search and seizure under the Fourth Amendment." *Schmerber v. California*, 384 U.S. 757, 767 (1966). Despite Petitioner's arguments about the routine nature of such intrusions, they remain particularly significant because, as the Court of Appeals for the Tenth Circuit has pointed out, "[a]

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[2] Robert Brooks Beauchamp, *'Shed Thou No Blood': The Forcible Removal of Blood Samples from Drunk Driving Suspects*, 60 S. CAL. L. REV. 1115, 1135 (1987).

person's home is his or her castle, and throughout history, one of the key purposes of a castle's walls has been to protect the castle-owner's blood." *Marshall v. Columbia Lea Reg'l Hosp.*, 474 F.3d 733, 745 (10th Cir. 2007). Consequently, "there remains the nagging feeling that the removal of blood from within the body of the accused by means of force in routine drunk driving cases shocks the conscience . . . ."[3] Even if the actual process of drawing an individual's blood against his or her will is a relatively minor procedure,

> it does not follow from the fact that a technique is a product of science or is in common, consensual use for other purposes that it can be used to extract evidence from a criminal defendant without his consent. Would the taking of spinal fluid from an unconscious person be condoned because such tests are commonly made and might be used as a scientific aid to law enforcement?

Breithaupt v. Abram, 352 U.S. 432, 442 (1957)(Warren, C.J., dissenting).

Amicus respectfully reminds this Court that the facts of this case are limited to "routine" arrests of suspected drunk drivers, and this is not a case involving "special facts," such as vehicular manslaughter. As the trial court noted, "[t]his was not an emergency, it was a run of the mill driving while intoxicated case." Pet. App. 43a. Moreover, "a prosecutor was readily available to apply for a

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[3] *Id.*

search warrant and a judge was readily available to issue a warrant." *Id.* Despite this, however, Petitioner takes the extraordinary step of claiming that in ***any*** case involving a suspected drunk driver – where that suspicion is based solely on a law enforcement officer's subjective determination – warrants are never required for forced blood samples. Such a position is squarely at odds with the Fourth Amendment.[4] *See United States v. Drayton*, 536 U.S. 194, 201 (2002) ("[F]or the most part per se rules are inappropriate in the Fourth Amendment context."); *Mincey v. Arizona*, 437 U.S. 385, 390 (1978) ("it is a cardinal principle that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions.")(internal quotations omitted)(citing *Katz v. United States*, 389 U.S. 347, 357 (1967)).

Despite Petitioner's claims to the contrary about the necessity of warrantless forced blood samples from suspected drunk drivers, the blood alcohol evidence at issue in this case – evidence that would have shown that Respondent had a blood alcohol level in excess of the legally permissible level – could have been obtained if Cpl. Winder had

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[4] U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

obtained a search warrant. Here, as Petitioner acknowledges in its Brief, obtaining a search warrant in this case would have taken "approximately two hours." Br. of Pet'r at 5. Moreover, the trial court below was presented with six recent cases in which search warrants authorizing blood draws had been obtained in less than an hour. Br. of Resp. at 7 (citing J.A. 70). In five of the cases, the time period from application to warrant was less than 30 minutes. *Id.* Accepting Petitioner's statement that the "rate of alcohol in the bloodstream is generally somewhere between .015 and .020 per hour[,]" Br. of Pet'r at 5, Respondent's blood alcohol level would have been in the region of 0.114 to 0.124 (accepting Cpl. Winder's two-hour estimation), more than the .08 g/dL legal limit.

Despite this, and eschewing the notion that "[t]he integrity of an individual's person is a cherished value of our society[,]" *Schmerber*, 384 U.S. at 772, Petitioner seeks to avoid the warrant requirement in ***every*** case of suspected drunk driving, even when it can secure its objective – securing blood alcohol evidence from the suspect – through compliance with the Fourth Amendment's warrant requirement. Such a per se rule is at odds with this Court's holding that all non-consensual "surgical intrusions beneath the skin depend[] on a case-by-case approach, in which the individual's interests in privacy and security are weighed against society's interests in conducting the procedure." *Winston v. Lee*, 470 U.S. 753, 760 (1985). *Amicus* readily acknowledges Petitioner's interest in obtaining evidence from suspected drunk drivers, but because this interest can be met through the use

of warrants (or through case-by-case determinations), Petitioner's argument must fail.

Moreover, this case (and run-of-the-mill drunk driving cases generally) is not a case where law enforcement was faced with the imminent destruction of evidence – such as where drugs are being flushed down the lavatory, *see Roaden v. Kentucky*, 413 U.S. 496, 504 (1973) – but rather where evidence is being slowly and gradually metabolized and destroyed. If it were, the blood alcohol evidence that Cpl. Winder obtained would not have been present. That the blood alcohol evidence would still have been available if a warrant had been obtained illustrates that warrantless nonconsensual blood samples simply provide law enforcement personnel with greater convenience in obtaining evidence from a suspect, rather than preventing the destruction of evidence. Greater law enforcement convenience, however, is not a basis for an exception to the Fourth Amendment's warrant requirement. *See Mincey*, 437 U.S. at 392 ("The investigation of crime would always be simplified if warrants were unnecessary. But the Fourth Amendment reflects the view of those who wrote the Bill of Rights that [individual] privacy . . . may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law."). Moreover, as Justice Scalia has asked, if law enforcement personnel do not need to obtain a warrant even when a warrant could be obtained expeditiously, "what rational officer would not take those measures?" *Thornton v. United States*, 541 U.S. 615, 628 (2004)(Scalia, J., concurring). It would be prima facie unreasonable, therefore, to permit an

exception to the Fourth Amendment when, as here, compliance with the Fourth Amendment's warrant requirement can satisfy the State's need. *See Brigham City v. Stuart*, 547 U.S. 398, 404 (2006) (holding that an action is "reasonable" under the Fourth Amendment as long as the circumstances, viewed objectively, justify the action). This further militates against Petitioner's request for a per se rule.

Even accepting that warrants might, on occasion, potentially be difficult to obtain on short notice, the solution is not to trample fundamental constitutional rights, but to enact procedures that allow for the expeditious issuance of warrants. The solution to this problem is not to allow a per se exception in all cases as this would result in an end-run around the Fourth Amendment. It would allow law enforcement to haul suspects – whether intoxicated or not – to medical facilities for nonconsensual blood samples based solely on their own suspicions. Moreover, "justify[ing] the officers in making a search without a warrant would reduce the [Fourth] Amendment to a nullity." *Johnson v. United States*, 333 U.S. 10, 14 (1948). Alternatively, at the very least, the propriety of law enforcement personnel not obtaining a warrant should be determined on a case-by-case basis, as opposed to through a per se rule permitting such searches.

II. Warrants Are Readily Available In Drunk Driving Cases.

Throughout its brief, Petitioner makes much of the exigent circumstances that purportedly justify an exception to the Fourth Amendment's warrant requirement. What Petitioner fails to do, however, is to present ***any*** substantive evidence that compliance with the warrant requirement would have prevented Cpl. Winder from obtaining relevant evidence from Respondent (or, indeed, other suspected drunk drivers). This alone illustrates that a per se rule is unnecessary and overbroad.

Petitioner's concerns undergirding its per se rule request are, at best, tenuous. Furthermore, they are not shared by its sister States. On the contrary, "approximately half of all states prohibit the warrantless blood draw that took place in this case . . . ." Br. of Resp. at 12. Rather than implementing legislation that infringes on Fourth Amendment rights, many of Petitioner's sister States find that compliance with the warrant requirement in routine drunk driving cases is relatively straightforward. The States of Arizona, Kentucky, and New York, for example, require arresting officers to secure warrants or court orders before obtaining a forced blood sample.[5] Petitioner has not shown any reasons why such procedures could not be used successfully in Missouri. This is for good reason, namely that Cpl. Winder could have obtained a warrant under Petitioner's warrant protocols and still secured the

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[5] *See* ARIZ. REV. STAT. ANN. § 28-1321 (2010); KY. REV. STAT. ANN. § 189A.105 (LexisNexis 2010); N.Y. VEH. & TRAF. LAW § 1194 (Consol. 2010).

blood alcohol evidence from Respondent that would have been sufficient to secure a conviction.

Similarly, Petitioner's concerns are not shared by the U.S. Department of Transportation, National Highway Traffic Safety Administration ("U.S.D.O.T."), which has published several case studies on the use of warrants in breath test refusal cases.[6] In one study, the report stated that, "[i]n general, police officers in these participating counties report that the 15 to 60 minutes of added processing time needed to obtain a warrant and draw blood was time well spent, and that the chemical evidence obtained from blood was of great value."[7] Moreover, such procedures, regardless of location, are straightforward:

> The basic process for using warrants in the four States was straightforward. If a driver was arrested for DWI and refused to provide a breath test, the arresting officer contacted a magistrate or judge, day or night, and by phone if necessary; the officer requested a

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[6] *See, e.g.*, U.S. Department of Transportation, National Highway Safety Traffic Administration, *Use of Warrants for Breath Test Refusal: Case Studies* (Oct. 2007); U.S. Department of Transportation, National Highway Safety Traffic Administration, *Use of Warrants to Reduce Breath Test Refusals: Experiences from North Carolina* (Apr. 2011), at i, *available at* www.nhtsa.gov/staticfiles/nti/pdf/811461.pdf.

[7] U.S. Department of Transportation, *Use of Warrants to Reduce Breath Test Refusals: Experiences from North Carolina*, *supra* note 6, at i.

> warrant that required the driver to provide a blood sample; and then arranged for the blood sample to be drawn.[8]

The U.S.D.O.T. noted that "***[j]udges and prosecutors interviewed strongly supported warrants***, to the extent of volunteering to answer the telephone in the middle of the night to issue a warrant."[9] Similarly, "[l]aw enforcement officers interviewed in case study States generally supported the use of warrants. They are willing to take the additional time that the warrant process requires in order to obtain BAC evidence."[10] The reports are perhaps most significant for what they do not state: there is no record that the surveyed jurisdictions failed to secure blood alcohol evidence by obtaining warrants. Even if such concerns exist, the reports note other procedures that are available to streamline the process and therefore help meet the need to obtain blood alcohol evidence promptly. For example,

> in Arizona and Utah, a number of law enforcement officers have been trained and certified as phlebotomists and are authorized to draw blood samples. They typically draw the blood sample at the police station, eliminating the need to transport the driver to a medical

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[8] *Id.* at 2.

[9] U.S. Department of Transportation, *Use of Warrants for Breath Test Refusal: Case Studies, supra* note 6, at vi (emphasis added).

[10] *Id.* at vi-vii.

> facility. If a law enforcement phlebotomist is not available, blood can be drawn by medical personnel as in Michigan and Oregon. In all States, the driver will be charged with and will face the penalties for a BAC test refusal, in addition to potential charges and penalties for DWI.[11]

Moreover, a variety of means exist whereby Petitioner may further discourage non-compliance with roadside testing and therefore disincentivize suspected drunk drivers from refusing to provide a blood alcohol test. As mentioned above, States can (and do) enact legislation that provides for sanctions for refusing to take a breath test.[12] Furthermore, States may further discourage breath test refusals (and the need for forced blood samples) by making punishment for refusal to take a breath test the same as a conviction for drunk driving.[13] The U.S.D.O.T. concludes by stating that

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[11] *Id.* at vi.

[12] *See* U.S. Department of Transportation, National Highway Safety Traffic Administration, *Refusal of Intoxication Testing: A Report to Congress* (Sept. 2008), at 7 (noting that in Minnesota, "[b]oth DWI and refusals are criminal offenses, and a driver can be convicted on either or both charges.").

[13] *See id.* at 7-8 (noting that in Minnesota "the legal consequences of conviction of a criminal refusal are the same as those of a criminal conviction of DWI."); *id.* at 9 (noting that in Nebraska, "[i]n almost every case (i.e., 98%), either the DWI or the refusal resulted in a conviction. . . . DWI and refusal carry the same sentence . . . .").

> it is clear that BAC test refusal does not necessarily lead to lower conviction rates, even if lack of BAC concentration information makes prosecution more difficult. When refusal is a separate criminal offense, offenders are likely to be convicted on the test refusal charge and perhaps on the impaired driving charge in addition.[14]

Alternatively, there is nothing to prevent Petitioner from enacting legislation that the refusal to take a breath test may be used as per se evidence of intoxication at trial. Easily implemented laws and procedures such as these meet the needs of States in combatting drunk drivers, while at the same time upholding individual constitutional rights.

Given the absence of necessity for abandoning the warrant requirement, both in this case and in routine drunk driving cases generally, eviscerating constitutional protections by implementing a per se exception to the warrant requirement cannot be justified in light of the alternatives available to Petitioner. The answer to the problems of suspected drunk drivers and the evanescent nature of blood alcohol evidence is through the use of effective laws and procedures such as these (or by making case-by-case determinations as to the exigent circumstances when delays arise in connection with the issue of a warrant). Only in this way can blood alcohol evidence be secured and constitutional rights be protected.

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[14] *Id.* at 10.

CONCLUSION

The problems associated with drunk drivers are familiar to this Court, the parties, and their respective *amici*. The solution to these problems, however, will not be solved through a per se rule allowing warrantless nonconsensual blood samples of suspected drunk drivers. *Amicus* therefore respectfully urges this Court to uphold the decision of the Missouri Supreme Court. To decide otherwise would create an exception to the Fourth Amendment's warrant requirement in numerous cases where there is not an exigent circumstance. As illustrated herein, experiences from Petitioner's sister States show that nonconsensual blood samples can be readily obtained through compliance with the warrant requirement and that a per se rule as requested by Petitioner is unnecessary. Indeed, this case could have been prosecuted with the incriminating blood alcohol evidence that could have been obtained through Petitioner's established warrant procedures. While case-by-case exceptions may, on occasion, justify a departure from the warrant requirement, the evidence is this case (and cases throughout the nation) shows that the need for a per se rule dispensing with the warrant requirement altogether is neither necessary nor justified.

Respectfully submitted,

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